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Politocracy

An assessment of the coercive logic of the territorial state
and ideas around a response to it

KOOS MALAN

Translated by Johan Scott

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An assessment of the coercive logic of the territorial state and ideas
around a response to it

by

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FOREWORD

Nowadays one is confronted by a deluge of predictable and repetitive commentaries on so-called 'good governance' and state administration. Most of the thoughts expressed skim carelessly over the Western World's age-old and captivating history — including a history of legal and political philosophy — and most contributions display one particular blindness: the assumption that the last few centuries have resulted in endowing civilisation with great 'progress'. What can therefore be more important to the discerning reader than a volume that, with clear objectivity and striking insight, exposes deep-seated and ironic setbacks in the history of state government, particularly over the last few decades? Prof Koos Malan's masterly and thorough analysis fills a glaring vacuum in available perspectives on traditions and practices of state government that affect all of our lives.

His work is guided by a core question — to what extent have peoples actually been liberated and empowered by reforms? Have the dark restrictions and forces of alienation, submission and servitude in the developed world really been buried in history, or have they merely been concealed by the respectable semblance of progress? While Professor Malan's penetrating survey of government forms and public law systems, from the Middle Ages to the present era of human rights and the bureaucratically managed and caring state, does acknowledge progress, it also poses deeply disquieting questions. The Renaissance, the Reformation, the curtailment of the divine right of kings, the acknowledgement of free-flowing individualism and rippling-out principles of a social contract that establish a government aimed at protecting mutually hostile individuals against one another and against the authorities, have indeed dramatically benefited the human condition in many respects. Meanwhile, however, as clearly demonstrated by Professor Malan, a new and infinitely stronger, but veiled threat has hatched in the newly found freedoms. What was described by Thomas Hobbes as 'Leviathan' — the 'mortal god' — has relentlessly extended his reign. Whilst the power of kings and priests ultimately proved to be vulnerable and precarious, the 'mortal god' of the state has strengthened his hold within the domain of national sovereignty. Malan describes the way in which the 'mortal god' has filled his initial empty loneliness with grateful dependence, human rights and welfare. By employing the strategy of 'nation building', populations have been persuaded to praise the jealous god by accepting the homogeneous identity of the bureaucratic nation state. Within his fortress of internationally recognised and enforceable national frontiers and sovereign status, the nation state can maintain a kind, albeit unassailable, new absolutism, described by Malan as massocracy.

Is there a better choice at mankind's disposal? To Malan's mind there is indeed such a choice. He reaches far back into the past, to the Greek city state *inter alia* in constructing part of the basis of an alternative model. Although he refrains from issuing constitutional

directives, he provides the reader with a moving picture of humankind reaching its full potential, within the 'habitative' communities that are able to restore the principle of mutual justifiability. This sagacious work, appearing under the title *Politocracy: An assessment of the coercive logic of the territorial state and ideas around a response to it*, deserves our close attention.

Lawrence Schlemmer

A WORD OF THANKS

I trust that *Politocracy: An assessment of the coercive logic of the territorial state and ideas around a response to it* will kindle some interest and debate among those taking a critical interest in the dynamic interplay between the modern state – including the South African state – and communities. It targets experts in law, political science, history and various social sciences, as well as all those who are interested in the historical and politico-philosophical background of the modern territorial state and in legally accounting for the claims of cultural and linguistic communities in particular, in the modern political era.

Naturally, the publication of this book caused me great pleasure. At the same time, I should add that the book is the product of a recurring fortunate combination of circumstances without which its publication would have been impossible. I am indeed fortunate to have been exposed to the knowledge and insight of a great number of people over many years. There are many of them – friends, acquaintances, colleagues, lecturers etc. Yet, one person in particular deserves specific mention – Danie Goosen – from whose extensive knowledge and formidable discernment I have profited over an extended period of decades. I have been equally fortunate over the years to have been exposed to great scholars of and commentators on the Western political and legal tradition. It is only fitting to recall that it would not have been possible to write a work of this nature without a sound and thankful exposure to this tradition. I find great pleasure in also thanking my colleagues in the Faculty of Law at the University of Pretoria – especially in the Department of Public Law – who have collectively contributed to a pleasant and intellectually stimulating work environment.

Originally, before it was adjusted in various ways and considerably augmented, this work had been a doctoral thesis completed under the able supervision of Professors Adrienne van Blerk of the Department of Jurisprudence at the University of South Africa and Hennie Strydom, at the time attached to the University of the Orange Free State.

Various persons, especially Johan Scott and Johan Kok, meticulously scrutinised the original Afrikaans manuscript. My sincere thanks is due to Johan Scott who, in translating this book into English, exceeded the degree of skill and care of the *diligens paterfamilias* and to Henda Scott who admirably succeeded in linguistically editing the completed manuscript in record time. I do not thank them only for their work in respect of this book as such, but for the close ties of friendship that we have forged. My heartfelt gratitude is also due to Lizette Hermann of Pretoria University Law Press (PULP) for her patient and meticulous finalising of the manuscript, as well as Yolanda Booyzen for the cover design. Juanita Larkin, the departmental administrator of the Department of Public Law, also

deserves exceptional gratitude for her able and efficient administrative assistance.

Koos Malan
March 2012

Dedicated to
Manie Malan
and ZB du Toit (posthumously)

TRANSLATOR'S NOTE

Translating this admirable work into English in certain respects proved to be more taxing than undertaking a translation in respect of a more 'orthodox' academic textbook. The mere title of the Afrikaans work – '*Politokrasie*' – is a creation of its author. No Afrikaans dictionary or thesaurus contains any reference to it and therefore from the outset one can lay aside any general or technical bilingual (Afrikaans-English) dictionary in your quest for a suitable English equivalent. Some would view this type of dilemma as a translator's nightmare, but to my mind it should rather be approached as an interesting challenge – a challenge to employ one's innate and acquired creative powers to produce a genuine English equivalent of the notional content of the product of a truly creative author's innovative abilities. What finally transformed this process into a translator's dream, was the close cooperation that existed between author and translator from the outset, enabling the latter to find satisfaction in the knowledge that the final, translated words conformed to the original meanings intended by the former as closely as possible.

A few words regarding the translations of some of these 'newly created' words could contribute significantly to dispel some uncertainties. A selection of these terms, accompanied by brief explanatory notes and references to the text of the work, will therefore now be produced (not in alphabetical order, but in order of their first appearance in the text; the Afrikaans equivalents are reproduced in brackets).

- Politocracy (*politokrasie*): The author applies this term to refer to 'an attractive space beyond the straits of the territorial state ... a legal-political order'¹ which in fact embodies true democracy.
- Statism (*staatlikheid*): This term denotes state ideology, referring firstly to the almost universal modern premise that the state is the main determinant of the public identity of individuals and secondly to the rules laid down for the scientific study in accordance with the needs of the state and for the sake of preserving the present state order.²
- Statist (*staatlike*): The adjective derived from the noun 'statism'. The recognised adjective 'state' (e.g. in state population) is derived from the noun 'state' and

¹ See 10 below.

² See 1-2 below.

therefore does not convey the same meaning as 'statist'.

Solfidianism (*solfidianisme*): In terms of the Lutheran doctrine of solfidianism 'salvation could only be achieved through faith – *sola fide* – and by the grace of God'.³ These two Latin words form the basis of this theological term.

Precariocracy (*prekariokrasie*): The Afrikaans version of this term is based on the property-law concept of '*prekaris*', which is the term for a holder at will and a derivative of the Latin '*precarium tenens*', the technical term for a holder at will (holder on sufferance/precarious holder). My English equivalent of 'precariocracy' is thus soundly based in the applicable Latin terminology, to convey the meaning of a statist dispensation where the majority holds sway – like an owner of movables who allows another (the *precarium tenens*) to hold or control such owner's movable property, subject to the owner's right to terminate such control at will and at any time – over the (or a) minority – the equivalent of the holder at will (*precarium tenens*) – where such minority is entirely at the mercy of the majority for purposes of exercising their political rights.⁴

Massocracy (*massokrasie*): This term refers to the 'democracy of the territorial state'⁵ or nation state that maintains a 'kind, albeit unassailable new absolutism'⁶ in which the 'unstable, atomised and heterogeneous masses who are avidly engaged in realising their own interests in the *megalopolis* (the large territorial state), has replaced the (ethnically) homogeneous organic-holistic *demos*.'⁷

Juridification (*juridifisering*): A process that occurs in the statist order with its rights-inspired society, according to which '[m]any prob-

³ See 53 below.

⁴ See 195 below.

⁵ See 197 below.

⁶ See v above.

⁷ See 201 below.

lems, including the most important public issues, are ... being defined and redefined and classified ... as issues of a legal nature, in order to fall within the operational domain and under the control of jurists'.⁸

Habitative community/ies
(*tuistelike gemeenskap/pe*):

The concept of a habitative community is one of the most fundamental concepts of politocracy. 'It is so important that it would always dominate any discussion on politocracy. Habitative communities refer to the cultural and/or local communities in which people live their daily lives.'⁹ I thought it best to construct this rather quaint term from the Latin noun '*habitatio*', meaning 'abode' or 'dwelling', viz the smallest possible communal unit to which a politico-constitutional significance can be attributed.

Idiotocracy (*idiotokrasie*):

This term is derived from the Greek word '*idiotos*', the Greek designation of a person who showed no interest in the affairs of the city state (the *polis*). The author employs the term to denote a system that runs counter to his preferred system of politocracy – namely where the bestowal of 'any measure of authority over the commonwealth on ... nonchalant and ignorant persons [i.e. those who never display any kind of interest in public affairs and are quite happy and content to be active only in the private domain]' takes place, 'for by such action the doleful antithesis of politocracy ... would be promoted.'¹⁰

Having substantiated the translations of some of the terms employed by Professor Malan, I sincerely hope that the chosen English equivalents of the products of his creative powers will contribute to a better understanding of the ideas expressed by this innovative and unconventional author. Afrikaans – one of South Africa's eleven official languages – is an indigenous language of the African sub-continent that has mainly developed from Dutch and in its written form would nowadays probably be understood abroad by most Dutch-speaking readers in the Netherlands and Belgium. It is, however,

⁸ See 228 - 229 below.

⁹ See 273 below.

¹⁰ See 304 in text and n 15.

imperative that the content of a work of this nature be made available to a much wider circle of readers, with an interest in topics such as constitutional law, politics, human rights and so forth. If this translation would contribute to unlocking the notional content of the original Afrikaans version of this work in any way, it would indeed be a substantial leap towards fulfilling my wish expressed some six years ago in respect of the translation of (important parts of) the existing corpus of Afrikaans legal literature into English.¹¹

Johan Scott
March 2012

¹¹ J Scott 'Enkele gedagtes oor Afrikaans as bedreigde regstaal' (Some thoughts on Afrikaans as a threatened legal medium of communication) 2006 *De Jure* 179 183.

CHAPTER 1

STATISM

When Thomas Hobbes wrote about the state in the mid-seventeenth century, he referred to it with great awe as Leviathan and the mortal god. At that stage, however, the state was still merely in its initial stages of development. Later the state would grow infinitely stronger than anyone could have anticipated. In the course of time it became apparent that the aliases of Leviathan and mortal god were no melodrama, but an apt description of the state that would later – and even today – become so dominant in the lives of individuals and communities. This state has also developed an own *ideology* by which it leaves its imprint on all of us, fosters dependence on the state and inculcates a belief in and loyalty towards the state. This work deals with the state and, more in particular, with this *statist ideology*, which I refer to here as *statism*. The reference to statism gives rise to two issues in particular:

Firstly, there is the striking phenomenon, which is an almost universal premise nowadays, that the state is the main determinant of the public identity of individuals. The individual's public identity is determined by the *state* and is consequently that of a *state* citizen. Owing to their roots in, association with and membership of a variety of communities and groups, individuals have a variety of other cultural, linguistic, religious, ethnic, regional and other similar identities. From the perspective of statism, however, in the final instance all of these are barely more than mere private identities. Only the state can exclusively lay claim to and exact its public state identity. Potential contenders for public identity are constantly and energetically excluded from the public sphere. Bikuh Parekh aptly describes how the state enforces a state identity and marginalises other identities when he asserts:

All its citizens are expected to privilege their territorial over their other identities; to consider that they share in common as citizens far more important than what they share with other members of their religious, cultural and other communities; to define themselves and relate to each other as individuals to abstract away their religious, cultural and other views when conducting themselves as citizens; to relate to the state in an identical manner; and to enjoy an identical basket of rights and

obligations. In short, the state expects of all its citizens to subscribe to an identical way of defining themselves and relating to each other and the state. This shared political self-understanding is its constitutive principle and necessary presupposition. It can tolerate differences on all other matters but not this one, and uses educational, cultural, coercive and other means to secure that all its citizens share it. In this important sense it is a deeply homogenizing institution.¹

Here in South Africa we are also confronted with the tiring inculcation of a statist identity to which certain minorities in particular are exposed. From the discussion later on in this work it is clear that this is a universal phenomenon which has manifested itself in many different places. The inculcation of a statist identity is the one aspect of statism that is discussed in this work.

Secondly, statism refers to the rules laid down for scientific study – scientific study in accordance with the needs of the state and for the sake of preserving the present statist order. This is scientific study based on what I describe as a statist paradigm. The focus of this aspect of *statism* is that – for the sake of the safeguarding and continuation of the present statist order and of statist identity – rules, directives and parameters for legitimate scientific study and intellectual activity are laid down and enforced within certain disciplines, namely political theory, political science and legal science. The activities of scholars in several disciplines constitute an orthodoxy of several scientific disciplines aimed at the preservation and continuation of the existing statist order. Although this paradigm plays an extremely forceful role, it remains undisclosed. It is neither discussed nor reflected upon. It is experienced and treated as a normal and obvious premise, almost as if it were something natural. This, of course, is not the case. It is an historical and thus a temporal phenomenon. It has appeared and it can also disappear, but because it is experienced as natural – as a reified premise – its transience is not considered. It is in fact the statist paradigm's perceived naturalness and *immortality* that makes it so formidable, for this established misconception can elicit but a single realistic reaction: to resign oneself to it, accept it and thus resignedly act in accordance with its dictates.

There is a constant and close interaction between these two aspects of statism, namely statist identity and the statist paradigm. In terms of the statist paradigm, scientific activity is applied to entrench and enhance statist identity, to combat potentially competitive identities and to strengthen individual and group dependence on the state.

¹ B Parekh *Rethinking multiculturalism: Cultural diversity and political theory* (2000) 185.

The pattern of scientific study in terms of the statist paradigm is therefore functional, because it is applied to serve the existing order and protect it against change. One is therefore actually here dealing with an essentially conservatively inclined type of scientific study aimed at the preservation of the statist status quo. As soon as a concept like conservative comes up for discussion the question arises as to whether we are in fact dealing with science or whether we are not rather moving into the sphere of politics and ideology. The answer is that both are present simultaneously. We are indeed confronted with a grey area or even a full concurrence of science and ideology. This is the reason why I refer to statism as state ideology.

The state under pressure

It may appear strange that there is a need to focus on statism, since the state is under increasing pressure at present and its position as a central political and legal institution is severely challenged. As a matter of fact, one of the most popular – even exciting – themes of our time is to focus on the variety of forces that exerts pressure on the state.

It is averred that the authority of the state has seeped away upwards, sideways and downwards.² The state is placed under pressure by the *politics of cultural identity*, that of *new nationalism* on the one hand³ and of international economic integration - globalisation – on the other hand.⁴ The state has lost so much of its economic sovereignty that doubt is sometimes expressed on whether it will remain the main building block of government.⁵ The traditional principle of state sovereignty and the prohibition against interfering in the domestic affairs of states, which is contained in article 2(7) of the Charter of the United Nations, is regarded by some as currently nothing more than a legal fiction.⁶ Some also express the opinion that the state has eroded to such an extent that the concept of state (national) identity has become an anachronism.⁷

Economic globalisation caused capital to become mobile to such an extent that a return to exchange control is hardly conceivable.⁸ This free flow of capital enables some multinational corporations to invest on a global front to such an extent that they can hardly be

² S Strange 'The defective state' (1995) 125 *Daedalus* 56.

³ V Cable 'The diminished nation state: A study in the loss of economic power' (1995) 125 *Daedalus* 23.

⁴ Cable (n 3 above).

⁵ Cable (n 3 above).

⁶ Strange (n 2 above) 66.

⁷ B Turner 'Outline of a theory of citizenship' in C Mouffe (ed) *Dimensions of Radical Democracy* (1992) 58.

⁸ Cable (n 3 above) 27.

regarded as belonging to a particular state any more. They have in fact become stateless⁹ and their top managements increasingly appear to be a stateless elite.¹⁰

Globalisation also brings about a similarity of national economic policies, under pressure of the financial markets. All states are in need of investments by multinational companies and therefore they are all pressurised to adopt fiscal, monetary and labour policies that will attract such investments.¹¹ This weakens the states' freedom to develop their own policies and has the additional effect that national legislatures have less freedom to formulate their own economic policies.¹² Globalisation furthermore causes technological, accounting and mercantile law standards, which were formerly fully determined on a national level, to be increasingly harmonised on a global or regional scale,¹³ which, in itself, has a further erosive effect on state sovereignty.¹⁴

Apart from globalisation, which has put the state on the defensive, the politics of identity have made a forceful appearance and are gaining in strength. New parties and movements focusing on a particular communal identity, whether in respect of language, culture, religion, territory or any other distinctive community, are gaining ground everywhere.¹⁵ The politics of identity have indeed disrupted the old ideological categories from left to right on an ideological spectrum¹⁶ and at the same time are placing many states under pressure of centrifugal forces. Accordingly, the last two decades have seen a marked increase in the rise of national states that had developed from former multinational states.

Although the state is under pressure, the state era has clearly not yet run its course. As will be explained in chapters 6 to 9, the state still offers obstinate and mostly successful resistance against non-state challengers. The statist paradigm undergoes constant refinement in order to domesticate – tame – certain concepts and movements that threaten the statist order, and then incorporate them to the advantage of the statist order.

⁹ Cable (n 3 above) 30; VA Schmidt 'The new world order incorporated' (1995) 125 *Daedalus* 79.

¹⁰ Cable (n 3 above) 36.

¹¹ Cable (n 3 above) 40.

¹² Schmidt (n 9 above) 76.

¹³ Cable (n 3 above) 34.

¹⁴ See generally TL Friedman *The world is flat: The globalized world in the twenty first century* (2005).

¹⁵ Cable (n 3 above) 44.

¹⁶ Cable (n 3 above) 46; see also in general SP Huntington *The Clash of Civilizations and the Remaking of World Order* (1996).

The state is still the single concept that dominates politics. Politics can be regarded as anything that concerns the state.¹⁷ On a practical level it is completely inconceivable to imagine life without the state. The state remains the primary enforcer of public identity and for the individual there is still no other refuge outside and without the state.¹⁸ The state plays such a central part in the daily existence of every human being, that a proper understanding thereof is crucial in order to understand the thinking and political practice of the nineteenth and twentieth centuries as well as the present era.

The state is the point of departure for almost all political and legal theorising. Concepts such as the law, rights, obligations, freedom, authority and sovereignty are all related to the state. Nearly all political problems and some of the most central legal problems are closely intertwined with the state and are *nolens volens* dependent on the state as their express or tacit base and point of departure.¹⁹

Before the state

The state, of course, did not always occupy such a dominant position. It was preceded by the *imperial-ecclesiastic global unity* in medieval Western Europe: the religious totality organised within the Roman Catholic Church and the concomitant political (temporal) totality organised within the Holy Roman Empire. All were members of this *Repubblica Christiana*.²⁰ Public identity was determined by membership of the *Repubblica Christiana* and not by being a state citizen as in modern times. Within this order determined by religion, politics were not state-driven, but in fact a mere branch of theology.²¹

In this prestatist era, the task of maintaining the sociopolitical cohesion and unity was to a large extent a religious function. Loyalty and obligations were fostered by a God-inspired mutual Christian citizenship.²²

Since the fifteenth century, a new type of political association progressively emerged in Western Europe.²³ However, this was a gradual process. The Reformation – the irreparable schism of the

¹⁷ A Vincent *Theories of the State* (1987) 5; FC Field *Political Theory* Methuen (1963) 54.

¹⁸ Vincent (n 17 above) 2; JR Strayer *On the medieval origins of the modern state* (1970) 1.

¹⁹ Vincent (n 17 above) 3 and 5.

²⁰ Vincent (n 17 above) 15.

²¹ Vincent (n 17 above) 15.

²² JR Morral *Political thought in medieval times* (1958) 10; C Brooke *Europe in the Central Middle Ages 962-1124* (1987) 39.

²³ KHF Dyson *The State Tradition in Western Europe* (1980) 25.

Repubblica Christiana – finalised the process and made it irreversible. However, even at the outset of the seventeenth century, membership of the Christian order was regarded as more important than loyalty towards the new states.²⁴ At the end of the seventeenth century the era of the *Repubblica Christiana* had finally run its course along with the dawn of the era of statism. Nowadays we are still in the era of the state.

The transformation from a universal religious *Repubblica Christiana* to statism was strikingly demonstrated by the corresponding variations in the naming of Europe. By 1600 Western Europe was still known as *Christendom*.²⁵ The concept of *Europe*, on the other hand, was associated with the phenomena of secularisation, sovereign states and religious freedom which symbolised the opposite of a uniform Christian political order. By 1680, however, the ideal of a universal monarchy and a united general Christendom had already foundered to such an extent that it was replaced by the more apt concept of *Europe*.²⁶

The state that made its appearance in this time and was well established towards the end of the seventeenth century was an entity that had been unheard of until that stage. It was an impersonal, abstract and permanent constitutional entity that exercised control over a consolidated territory.²⁷ It was impersonal and abstract in the sense that since that time, the state, deviating from past practice, did not place a mortal prince, to whom personal allegiance was due, in the centre; on the contrary, the state now existed as an autonomous and lasting entity, disengaged from the prince's temporality and mortality.²⁸ The state distinguishes itself from its rulers and officials who are vested with temporary power and in addition distinguishes itself from the society or community which it governs. Quentin Skinner expresses this as follows:

Rather the state must be acknowledged to be an entity with a life of its own, an entity which is at one distinct from both rulers and ruled and is able in consequence to call upon the allegiance of both parties.²⁹

The new political entity of the state brought along the complete obsolescence of the old designations that were applied to describe

²⁴ H Kohn *The idea of nationalism* (1944) 187.

²⁵ DH Pennington *Seventeenth Century Europe* (1970) 21; JM Roberts *The Penguin History of Europe* (1996) 172.

²⁶ HD Schmidt 'The establishment of Europe as a Political Expression' (1966) 9 *The Historical Journal* 172.

²⁷ Dyson (n 23 above) 28; D Held *et al* 'The State' in T Ball *et al* (eds) *States and Societies* (1985) 1; Q Skinner *Political innovation and conceptual change* (1989) 112.

²⁸ Skinner (n 27 above) 112.

²⁹ Skinner (n 27 above) 112.

the political entities of the Middle Ages and the Renaissance. In earlier times, concepts like *realm*, *body politic*, *commonwealth*, *common weal*, *civitas* and *republic* were applied³⁰ to denote the numerous small kingdoms and republics of the Middle Ages and Renaissance — all of them small political entities of restricted tempero-spatial extent.

The new state, with its autonomous, permanent, impersonal and abstract character, differed so drastically from its predecessors that all these terms gradually fell into disuse on account of their inability to describe the new entities. The new term was state (*etat*). It was used for the first time in 1538 by Thomas Starkey, but did not really gain acceptance at that stage. It was later used by Raleigh, Francis Bacon and in the early seventeenth century English translations of Jean Bodin's work.³¹ It was, however, Thomas Hobbes in particular who fully embraced the advent of the new political entity by explicitly applying the terminology associated with it. Although Hobbes sometimes still employed other terms, he explicitly treated the state as an impersonal, autonomous and sovereign entity — the state in its new form.³²

The territorial state

Hobbes went out of his way to apply the correct terminology to the new entity. In Hobbes's view, this artificial entity that creates and maintains order is the *mortal god*, the *state*, or the *Leviathan*, a term particularly associated with Hobbes. Since Hobbes's time this *Leviathan*, the state, has been the *master noun*, the *master concept* that featured in public discourse,³³ the inspiration for the statist paradigm as well as the source and enforcer of state identity.

Nowadays the state is generally referred to as the national state or nation state. This is a confusing yet well-established misnomer. This misnomer rests on the assumption that states distinguish themselves through the distinct nations inhabiting the different states, or rather that it is a specific characteristic of every state that it is inhabited by a distinct, distinguishable nation. This, of course, is far from the truth. To qualify as a state, an entity is not required to be the political arrangement of a specific nation. It is therefore misplaced and misleading to refer to the state as a nation state.

³⁰ Skinner (n 27 above) 121; Dyson (n 23 above) 36.

³¹ Skinner (n 27 above) 120; Dyson (n 23 above) 36.

³² Skinner (n 27 above) 121.

³³ Skinner (n 27 above) 123.

The misnomer is the result of the association of nation with state. The famous historian, Hugh Seton-Watson, illustrates this misnomer and consequent confusion in the following words:

The belief that every state is a nation, or that all sovereign states are national states, has done much to obfuscate human understanding of political realities. A state is a legal and political organization, with the power to require obedience with loyalty from its citizens. A nation is a community of people, whose members are bound together by a sense of solidarity, a common culture, a national consciousness. Yet in the common usage of English and other modern languages the two distinct relationships are frequently confused.³⁴

In order to describe the modern state more appositely, one should thus use more appropriate terms. One alternative possibility is that of sovereign state,³⁵ but the loss of sovereignty referred to earlier on disqualifies this term. Will Kymlicka's use of the term *multination state* instead of *nation state* has merit, because it also exposes the fallacy that a specific nation inhabits its own state.³⁶ Michael Walzer's choice of *putative nation state*³⁷ furthermore exposes the uncritical erroneous application of national state and thus also deserves support.

In this work the misnomer *nation state* will not be applied. Various other terms are more appropriate. Many theorists prefer to use the concept of *territorial state*.³⁸ I find the concept attractive as it portrays the nature of the state much more faithfully than the concept of *nation state*. It is a sovereign political organisation within an established territory, irrespective of the homogeneity or heterogeneity of its population, and irrespective of whether its population is connected by any common cultural, linguistic, religious or ethnic ties. An alternative concept which closely relates to *territorial state*, is that of the *citizen state*.³⁹ The concept intimates that the only common factor of persons who inhabit a state is to be found in their common abstract legal relationship with the state; it does not signify the existence of any additional commonality, for

³⁴ H Seton-Watson *Nations and States* (1977) 1.

³⁵ Seton-Watson (n 34 above) 2.

³⁶ W Kymlicka *Liberalism, community and culture* (1991) 239.

³⁷ M Walzer 'Pluralism: A political perspective' in W Kymlicka *The Rights of Minorities* (1995) 140.

³⁸ See, for example, the English legal historian, W Holdsworth *A History of English Law* (1937) Vol VIII 310, as well as R Falk 'The Rights of Peoples (In particular indigenous peoples)' in J Crawford *The rights of peoples* (1988) 26; S Strange (n 2 above) 70; JN Figgis *Political thought from Gerson to Grotius, 1414-1625* (1960) 72; AB Bozeman *Conflict in Africa* (1976) 131; J Habermas 'Law and Morality' in M McCurrin Stanley (ed) *The Tanner Lectures on Human Values Vol VIII* (1988) 260; H Spruyt *The sovereign state and its competitors: An analysis of systems change* (1994) 3; HJ Berman *Law and Revolution: The formation of the Western Legal Tradition* (1983).

³⁹ NGS van der Walt *Die Republikeinse Strewe* (1969) 18-19.

example, on the basis of culture, language, religion or ethnicity. In contrast to *nation state*, which erroneously suggests that a characteristic of the modern state is the common cultural nature of the persons who inhabit it, this term avoids such a misrepresentation. For reasons that will become evident in chapter 6, I have chosen *territorial state* as the option that most appropriately describes this concept. This term will henceforth be used.

This work is divided into the following chapters: Chapter 2 discusses the *Repubblica Christiana* as the predecessor of the era of statism. This discussion affords a better understanding of the particular nature of the present statist era. In chapter 3 the process that paved the way to the era of statism is discussed. This chapter illustrates the philosophical and political erosion of the universal Christian order and explains how a variation of forces and ultimately the Reformation — an epoch-making revolutionary political event — finally made the continuation of the *Repubblica Christiana* impossible and heralded the era of statism.

Chapter 4 focuses on the intellectual labours of the pioneers of statism. Although they are numerous, Jean Bodin, Thomas Hobbes, John Locke and Hugo Grotius in particular will be discussed.

Chapter 5 in the first instance explains what the concept of *paradigm* means. Thereafter the parameters and disciplines of the *statist paradigm* in particular will be exposed. Chapters 6 to 9 focus on various aspects of the statist paradigm and identity. Chapter 6 contains a discussion of state building (nation building) as a basic strategy of statist identity and explains how legal categories are applied for this purpose. Chapter 7 focuses on democracy and democratic theory and demonstrates how democracy, which has the ability to place the present statist order under pressure, has been weakened and ultimately utilised to serve statist identity. Chapter 8 takes a look at human rights and describes how human rights that profess to restrict the state — in the sense of government — ultimately enhances state power and stabilises the dependency of individuals and groups on the state. Chapter 9 focuses on two general legal concepts that illustrate how legal science in fact serves the statist order. There are many legal concepts and constructions of this nature, but only two of the most striking ones are discussed — one on the domestic level and the other in the international domain. Consequently, the first topic to be discussed is high treason. This is followed by a discussion of the legal position in terms of international law pertaining to territorial integrity and restrictions on self-determination and secession.

It will, however, not be sufficient to render a mere description and illustration of the state paradigm and the coercion of a territorial

state identity, as there is in fact an attractive space beyond the straits of the territorial state. What is referred to here is not globalisation alone, but a legal-political order. To this order I refer as *politocracy* or, rather, a *politocratic* order. The details of politocracy are explained in chapter 10.

CHAPTER 2

REPUBLICA CHRISTIANA - THE PREDECESSOR OF STATISM

1 Religious identity

When Pope Leo III crowned Charlemagne as *Imperator Christianissimus* on Christmas day in the year 800, the long transition from the secular Roman empire to a new Christian commonwealth was finally executed. Although Charlemagne's empire was not everlasting, it left a permanent heritage, namely the notion of a united Christendom within a united empire. This idea formed the axis of political thought and practice during the ensuing Middle Ages¹ and it was the Western European person's primary source of public individual identity.

One can trace the roots of the medieval Christian order to the termination of the city state (*polis*) order of the Classical period.² The antique Greek political order and political philosophy focused on the *polis* citizen, who lived in close cohesion with his fellow citizens and their collective fortunes within the all-important *polis*. The replacement of the *polis* with an extensive worldly state – a cosmopolis – which was established with the advent of the Macedonian empire of Alexander the Great and later with the Roman Empire, relegated to memory the central position that *polis* citizenship had occupied in political philosophy and the political system. The new theme that emerged with the advent of the cosmopolitan order, focused on the individual as a person who is detached and often aloof in a universal cosmopolis, and not on the individual as a participating *polis* citizen, as before.³

The new medieval Christian universalism represents a later phase of this epoch.⁴ Stoic philosophy, which originated around 300 BC, was

¹ T van Wyk & SB Spies *Western Europe from the decline of Rome to the Reformation* (1985) 88; H Kohn *The Idea of Nationalism* (1944) 78.

² GH Sabine *A History of Political Theory* (1971) 159.

³ WW Tarn *Hellenistic Civilization* (1952) 79.

⁴ Sabine (n 2 above) 161.

the driving force behind this epoch.⁵ Stoic universalism profoundly influenced the political and spiritual world in the Roman Empire and left an indelible mark on Roman law and the Roman political system. This is demonstrated by the emperor Caracalla's imperial edict, the *Constitutio Antoniniana*, enacted in the year 212 AD.⁶ This edict individualised Roman citizenship by extending it to nearly all inhabitants of the Empire.⁷

Although Rome was the centre of the Roman Empire for many centuries, political, economic and cultural forces gradually caused the Empire's centre of gravity to shift to the eastern Mediterranean coastal region. This left a vacuum in the west, which would eventually be filled by the church and its functionaries, giving Western Europe its specific religion-based universalism and identity.⁸

The establishment of the centre of the Roman Empire in the eastern Mediterranean coastal region is demonstrated *inter alia* by the fact that the schools of philosophy and law found a home in the east: the former in Athens and the latter in Beirut. After 200 AD all the prominent writers of the Empire also came from the east. Furthermore, Rome was no longer the economic centre. Even that had moved eastwards and, even more importantly, two thirds of the Empire's population had settled in the eastern territory.⁹ The eastern territory was economically active and intellectually sophisticated; in contrast, the west gradually became more rural and unsophisticated.¹⁰ The political centre had shifted from Rome to Constantinople.

However, the church and its functionaries – its bishops and later its monks – remained in the west – in Italy and its environs. Here, the Empire's gradual loss of power and influence also caused the church to continuously gain in power and influence. The decline of the state caused the church to progress. Social protection was increasingly provided by the bishops and not by the magistrates of the Empire, as had previously been the case. The church became the provider of schools and hospitals. Instead of the state, the church progressively also became the protector against despair and poverty. Without premeditation the functions of the state administrator were taken over by the bishop, with the approval of the population.¹¹ The church

⁵ Sabine (n 2 above) 145.

⁶ DH van Zyl *Geskiedenis en beginsels van die Romeinse Reg* (1977) 48; P van Warmelo *An introduction to the principles of Roman civil law* (1976) 44.

⁷ Van Zyl (n 6 above) 81; Van Warmelo (n 6 above) 44; WW Buckland *A textbook of Roman law: From Augustus to Justinian* (1968) 98.

⁸ JR Morral *Political thought in medieval times* (1958) 10.

⁹ H Trevor-Roper *The rise of Christian Europe* (1966) 47-8.

¹⁰ H Trevor-Roper (n 9 above) 49-50.

¹¹ RH Barrow *The Romans* (1949) 191.

had therefore stepped into the void created by the disintegration of the state.¹²

Men were finding in membership of the Christian Church the sense of citizenship which neither Rome nor municipality could any longer offer them.¹³

However, as late as the fifth century Western European society was still a secular community, observing Christianity as state religion. By the eighth century this position had changed completely. By that time it had developed into a fundamentally Christian community¹⁴ in which the church dominated nearly all spheres of life. In contrast with its secular predecessors who concentrated on the Mediterranean Sea, this community increasingly focused on northwestern Europe. This was symbolised by Charlemagne's decision to establish his capital at Aachen near Cologne in present-day Germany.

One of the most important events that signalled the transition from the Classical world to the impending religious-centred Middle Ages, was the publishing of the patriarch Saint Augustine's work *De Civitatis Dei* at the beginning of the fifth century. It has been said that this is such an important work that a comprehension of the Middle Ages would not be possible without it.¹⁵

Saint Augustine witnessed how the Visigoths, under the leadership of Alaric, attained the seemingly impossible by sacking Rome in 410 AD. This event shook the apparently invincible *Pax Romana* to its foundations, to the utter horror of Roman citizens. Against the background of these traumatic events Saint Augustine endeavoured to create a vision of a timeless empire of peace and justice in the divine commonwealth — the *Civitas Dei*.¹⁶ The establishment of the Holy Roman Empire later on justified its existence *inter alia* on the basis of Saint Augustine's work.¹⁷ In fact, the influence of *De Civitatis Dei* only kept growing and Lord Bryce declared — possibly somewhat exaggerated — that *De Civitatis Dei* lay the foundations for the Holy Roman Empire.¹⁸

Augustine firstly attempted to defend Christianity against the reproach that it had been the cause of the Roman Empire's decline. Christianity was accused of causing the disintegration of the inherent fibre of the Empire, by reason of its neglect of civic values and

¹² Kohn (n 1 above) 76.

¹³ Barrow (n 11 above) 190.

¹⁴ Van Wyk & Spies (n 1 above) 72-3.

¹⁵ JN Figgis *Political aspects of St Saint Augustine's City of God* (1963) 1.

¹⁶ W Ebenstein *Great political thinkers: Plato to present* (1969) 175; Figgis (n 15 above) 6; 42.

¹⁷ Figgis (n 15 above) 85.

¹⁸ Figgis (n 15 above) 84.

republican virtues and had thereby terminally weakened the Empire's power of resistance.¹⁹

Augustine's work, however, is at the very least merely defensive. It also offers a philosophical and theological apology for the Christian-centred political totality, which would determine the vicissitudes of Western Europe in the centuries to come.

For Saint Augustine, history progresses towards the final accomplishment of a divine purpose. In this process the earthly states are of a transient nature and of mere fleeting interest. These states come and go. In contrast to this, a permanent divine state is reached which is also embodied in this world. The Roman state was also such a temporary worldly order that lacked the ability to afford a genuine guarantee of permanent safety, justice and freedom.²⁰

In contrast with the temporal orders of this world, one finds the divine commonwealth — the *Civitas Dei*. It collects its flock from the whole of humanity.²¹ The *Civitas Dei* was established long ago on a divine basis and is destined to last forever. The *Civitas Dei* is the absolute focal point in the course of world history.

Augustine's point of departure is the unity and sociality of mankind.²² Therefore, history does not progress as a variable amount of detached events, but as a universal unit that encompasses mankind in its totality.²³ This unit, which is a mystic totality, is the Empire of Christ. This mystic totality finds expression in the real *corpus Christianum*, which is organised here on earth in the form of the church.²⁴ After the decline of the Roman Empire which, as a human creation, was destined to perish, the *Civitas Dei* was regarded as the only true community. In this world the church identifies most strongly with the *Civitas Dei*. The church is, as it were, the symbol of the *Civitas Dei*.

What Saint Augustine teaches about the church and the relationship between the church and the political order (the state) is of cardinal importance, since it is a first indication of the emergence of the medieval universal religious order. To Saint Augustine's mind the church is by necessity a universal and imperial organisation.²⁵ The

¹⁹ Figgis (n 15 above) 9; 36; Ebenstein (n 19 above) 171-172.

²⁰ Figgis (n 15 above) 32-36.

²¹ Figgis (n 15 above) 21.

²² Figgis (n 15 above) 38.

²³ Figgis (n 15 above) 43.

²⁴ JPA Mekkes *Proeve eener critische beschouwing van de ontwikkeling der humanistische rechtsstaatstheorieën* (1940) 78.

²⁵ There is a school of thought that Saint Augustine lay the foundation for papal dominance in the church and for ecclesiastical dominance over the state. See for example Figgis (n 15 above) 77.

church, modelling itself on the *Civitatis Dei*, is obliged to be the community of the faithful on earth and has to necessarily be of a general, or rather catholic, nature. It comprises all the faithful, regardless of their backgrounds, and can thus never have a particular character.²⁶ This argument of Augustine serves as a basis for the universal church of the Middle Ages. The notion, as well as the practice of the church's unity and universality can mainly be ascribed to Augustine.

The role of the political order in medieval times can also be traced to Saint Augustine. Saint Augustine recognises the political order as a natural premise.²⁷ Whereas universality and unity are absolute conditions for the church, Saint Augustine, on the other hand, propagates particular political orders that are restricted in scope and are in reality family associations. The main aim of the political order, however, is merely to complement the church. The political order's primary function is to facilitate man's journey to the final destination – the *Civitas Dei*.²⁸ The political order should serve religious purposes and therefore, the church.²⁹ Political orders must act as educators, combat heresy and accept the dictates of the church in that respect.³⁰

The primary religious identity of this era was reflected in the dominating role of the church. Almost all developments in the fields of agriculture, industry and commerce could be attributed to the activities of the monasteries. During the tenth and eleventh centuries, the activities of the monasteries made a considerable contribution towards restoring economic and civil order, after the chaos that followed the invasions of Western Europe by Norsemen, Arabs and Hungarians.³¹

The monastery was also the centre of medieval intellectual activity and often the only alternative to the military profession,³² which did not appeal to everyone. On the political front, successive weak emperors in the west, along with the disintegration of the bureaucracy, created the opportunity for the church to extend its political power. At the turn of the sixth century, the disappearance of the Roman state administration in Gaul (France) and Spain and the inefficient administration in Italy had meant that functionaries of the church gradually took over all administrative functions in these

²⁶ Figgis (n 15 above) 70-71.

²⁷ Figgis (n 15 above) 58; Mekkes (n 24 above) 78.

²⁸ Figgis (n 15 above) 15.

²⁹ Mekkes (n 24 above) 78-79.

³⁰ Figgis (n 15 above) 78.

³¹ G Miccodi 'Monks' in J le Goff *et al* (eds) *The medieval world* (English translation by LG Cochrane) (1990) 51.

³² Miccodi (n 31 above) 64.

regions.³³ During the Lombardic threat of Italy in the late sixth century, the only efficient political leadership came from the church. Pope Gregory the Great exercised a typical political function in 595 AD when he negotiated a peace treaty with Agulf, the Lombardic king.³⁴ In the centuries that followed, functionaries of the church, who represented the only educated segment of society, were to exercise the political and administrative functions on a continuous basis.³⁵

Likewise, the economic strength of the church waxed. The church became a large owner of land and became rich as a result of the agricultural activities on this land. Quite often the church also controlled local markets and the mills. In addition, the church also earned handsomely from the rendering of spiritual services for which church functionaries exacted compensation from the lay population and lower ranking functionaries were obliged to compensate higher ranking functionaries. Taxes were raised for the maintenance of church buildings and fees were also raised for the solemnisation of marriages, participation in the mass and hearings by ecclesiastic tribunals.³⁶ By 1000 AD the church was firmly established in its role as governing body, land owner, landlord, imposer of taxes, economic producer, large-scale employer, business institution, artisan, banker, mortgagee, moral guardian, teacher and enforcer of conscience.³⁷

The top stratum of the medieval pyramid was occupied and dominated by church functionaries. In the twelfth and thirteenth centuries in particular, the judges, legal practitioners and professional advisers and functionaries of secular courts were ecclesiastics. If they had not received formal training in canon law, they were at least acquainted with its salient features.³⁸ A threefold distinction was drawn in the medieval social order between the votaries (*oratores*), warriors (*bellatores*) and labourers (*laboratores*). The ecclesiastics – the monks in particular – as votaries occupied the top and most powerful position in this order. Monks were regarded as being intellectually superior and life in the monasteries signified a choice in favour of culture and knowledge.³⁹ Erudition was something that was reserved almost exclusively for church functionaries during

³³ Van Wyk & Spies (n 1 above) 6.

³⁴ Van Wyk & Spies (n 1 above) 65.

³⁵ Ebenstein (n 19 above) 243. B Tierney 'Medieval Canon Law and Western Constitutionalism' (1966) 52 *The Catholic Historical Review* 8 maintains that there was a constant interaction of ideas and personnel between ecclesiastic and temporal institutions.

³⁶ H Heaton *Economic History of Europe* (1948) 83, 84.

³⁷ Heaton (n 36 above) 84.

³⁸ HJ Berman *Law and revolution: The formation of the Western legal tradition* (1983) 274.

³⁹ Miccoli (n 31 above) 53, 64.

the Middle Ages.⁴⁰ Theology was regarded as the most profound expression of knowledge.⁴¹

The central characteristic of medieval philosophy was its domination by Christian theology. The philosophical discourse was approached from the angle of theological assumptions and philosophical questions were always approached from a theological point of view.⁴² The approach to philosophical questions was always more theological than purely philosophical.⁴³ Medieval thought primarily proceeded from the point of departure that every person should endeavour to ensure the redemption of his or her soul in the first place and that the saving of the soul is the main objective of everyone's earthly existence. This was no abstract ideal, but a practical task to which everyone should devote himself or herself continuously. This idea had a detrimental effect on all economic activity, for it was thought that someone who spent all his energy towards amassing riches instead of securing the redemption of his soul, could hardly please the Almighty God.⁴⁴

The domination of religious universality was enhanced by two forces which were also of a universalising character.

First, the Latin language was the uniform medium of learning and literary education, as well as the language of officialdom and diplomacy.⁴⁵ Latin was the holy, global language of the entire Christian world that stretched beyond private boundaries. It was in fact this communality, fostered by the use of Latin, which created the notion of a global Christian world⁴⁶ and gave concrete content to the Christian communal idea.

Secondly, there were ecclesiastical functionaries – in particular the monks – who, due to a network of monasteries all over Europe, formed a well-organised uniform entity.⁴⁷ The Western European intelligentsia formed a single undifferentiated cultural unity.⁴⁸

⁴⁰ MFB Brocchieri 'The Intellectual' in J le Goff *et al* (eds) *The medieval world* (English translation by LG Cochrane) (1990) 182.

⁴¹ Brocchieri (n 40 above) 187.

⁴² FC Copleston *A history of medieval philosophy* (1975) 5, 9; RN Berki *The history of political thought: A short introduction* (1975) Ch 4 describes the political philosophy of the Middle Ages as political thought with a religious vision.

⁴³ Ebenstein (n 19 above) 214.

⁴⁴ S Viljoen *Economic systems in world history* (1974) 158.

⁴⁵ Kohn (n 1 above) 83; Broccheri (n 40 above) 184.

⁴⁶ B Anderson *Imagined communities: Reflections on the origins and spread of nationalism* (1983) 20-2 Qur'an-Arabic performed the same role and still does so today in the Islamic community.

⁴⁷ Kohn (n 1 above) 83; Broccheri (n 40 above) 184.

⁴⁸ See the reflections of Berman (n 38 above) 161 with reference to David Knowles.

Religion was also the main determinant of medieval global politics. In the Middle Ages, international relations could primarily be seen as the tense interaction between Western Christendom and the Islamic Near East, instead of interstate relations as we know it today. Although there were in fact political boundaries between fragmented feudal units and later between the emerging monarchies, in reality the cardinal boundaries were the frontiers between the Christian commonwealth and the Muslim world. In this context there was no international law in the form of a system that primarily aims to regulate relations between states. The simple reason for this was the absence of states as the primary subjects of international law. The raw materials for the creation of international law only became available later, during the seventeenth century, with the establishment of the state system.

Medieval Europe was therefore a Christian commonwealth in the first place. It was indeed not Europe, but the more appropriately *Western* Christendom, the *Repubblica Christiana*, the organic totality of a republic of the faithful. In this context, the individual's cultural, linguistic or political identity was of little or no value. Individual identity was, above all, of a Christian religious nature. In terms of medieval anthropology, the question as to who man is was answered by stating that he is a creation of God.⁴⁹ Nationalism was unknown and a distinctive identity was of lesser importance.⁵⁰ Hans Kohn explains it as follows:

People looked at everything not from the point of view of their 'nationality' or 'race' but from the point of view of religion. Mankind was divided not into Germans and French and Slavs and Italians, but into Christians and Infidels and within Christianity into faithful sons of the Church and the heretics.⁵¹

Mankind was regarded as a unit and had to form a single community, encompassed in one empire and one church. Referring to Kohn again:

Since Christendom in the Middle Ages was coextensive with humanity, at least as a goal, mankind was regarded as one people, a *res publica genesis humani*, one *ecclesia universalis* with one law and one government.⁵²

Within this context religion was definitely no mere personal matter. Religion was the cornerstone of political organisation in the Middle Ages. Undermining the religious unity – a form of heresy – was

⁴⁹ J le Goff 'Introduction: Medieval Man' in J le Goff *et al* (eds) *The medieval world* (English translation by LG Cochrane) (1990) 3.

⁵⁰ Kohn (n 1 above) 78.

⁵¹ Kohn (n 1 above) 79.

⁵² Kohn (n 1 above) 79.

therefore absolutely intolerable, as it would fundamentally disrupt the political (and religious) order.

Religion was a full-scale — if not the only — political category. One can conveniently apply the views of the German political philosopher, Carl Schmitt, on the nature of politics and the lines of political division in an attempt to understand the Middle Ages. Schmitt asserts that the distinguishing characteristic of politics is the fact that political dividing lines (in contrast to other dividing lines) are so intense that the relationships of groupings on either side of these lines can be described as hostile.⁵³ Any religious, moral, economic, ethnic, linguistic, ethnic, cultural or other antithesis transforms into a political antithesis and thus becomes a political category as soon as it is strong enough to divide human collectivities in terms of the relationship of friend and foe.⁵⁴ Therefore, a religious community waging war against another religious community is, in addition to being a religious community, also a political community.⁵⁵

Political divisions and the development of political categories can come about as a result of a variety of human convictions and practices, like religious, moral, cultural as well as other convictions and practices. Politics lack a unique substance, detached from the above-mentioned activities. The phenomenon of politics rears its head when the religious, moral, cultural, national or other tension grows so intense that it develops into a relationship of mutual hostility.⁵⁶

The real friend-enemy grouping is essentially so strong and decisive that the nonpolitical antithesis, at precisely the moment at which it becomes political, pushes aside and subordinates its hitherto purely religious, purely economic, purely cultural criteria and motives to the conditions and conclusions of the political situation at hand.⁵⁷

In the Middle Ages, religion reveals itself as a true political force. Religion affords the medieval political community its fundamental characteristic and also identifies another religious community as its extreme antithesis — its enemy. This explains why the most important dividing line was determined by religious identity and why medieval Europe was aptly described as an imperial-ecclesiastic (politico-religious) unity.

⁵³ C Schmitt *The Concept of the Political* (translation, introduction and notes by George Schaab) (1996) 26, 63.

⁵⁴ Schmitt (n 53 above) 37.

⁵⁵ Schmitt (n 53 above) 37.

⁵⁶ Schmitt (n 53 above) 38.

⁵⁷ Schmitt (n 53 above) 38.

Just as religion on a global scale, *between* the Christian commonwealth and the Islamic world, was the primary political category, it was also the most important political category *within* the Christian world. This is clear from the fact that criminal law was used to maintain the religious orthodoxy and to prosecute any form of heresy that could adversely affect the *pure* Christian character of the church. This is borne out by the close cooperation between the ecclesiastic and temporal spheres of power, where the temporal power sphere prosecuted sins as criminal deeds in terms of criminal law and thereby supported the religious-ecclesiastic sphere. Although a marked distinction was drawn between the ecclesiastic and political spheres of power after the *papal revolution* of the late eleventh century, as explained in the second part of this chapter, the political sphere still played a fundamental role in maintaining the ecclesiastic order. Heresy, which had to be combated by the church, was also regarded as high treason by the temporal authorities and attracted the death penalty. The church was loath to impose capital punishment and was thus served well by the temporal authorities which acted on its behalf in this regard.⁵⁸

It could appear unconvincing to regard rules of criminal law as an indication of the existence of a political category. This, however, is by no means such a strange phenomenon for when an orthodoxy has grown strong enough, it utilises criminal law to enforce its views. When, on the other hand, the orthodoxy grows weaker and is challenged by an alternative religious denomination, criminal law mechanisms are unable to preserve orthodox constructions. A religion-inspired civil war then follows, as was the case in sixteenth-century France. This type of civil war reveals that religion has always, invisibly and in the guise of criminal law, functioned as a political category. Although they are fundamentally different phenomena, religion-inspired criminal law rules on the one hand and a religion-driven civil war on the other hand, are the strategic and tactical servants of the preservation of religion as a political category. Criminal law merely conceals its political qualities in rhetorical fashion, because a (religious) criminal is treated in terms of criminal law without mention being made of the fact that in reality, such criminal is treated as a political and religious enemy.

The development of statism as successor to the *Republica Christiana* is incidental to the removal of the public political nature of religious identity and the relegation of religion to the private sphere.

Growing secularisation caused the erosion of a Christian public identity which became irreparable when the Reformation brought an

⁵⁸ See for example Berman (n 38 above) 73, 186, 476.

end to Christian unity. Chapter 3 will focus on this topic. First of all, we shall concentrate on medieval legal concepts, in particular the medieval concept of constitutionalism. These concepts form a fundamental ingredient of medieval politico-legal conceptual reality. A good understanding of this will, by way of contrast, enable us to have a better understanding of later and contemporary concepts.

2 Medieval constitutionalism

The term *constitutionalism* is of fairly recent origin and only found its way into the lexicon of the public discourse during the nineteenth century. The notion of constitutionalism, however, is much older than the term itself and had already occupied a prominent position in the public discourse and thought on politics and government for many centuries, albeit under a variety of other designations.⁵⁹ This explains why the term 'medieval constitutionalism' is in fact alluded to. The concept of constitutionalism in its most basic form is associated with principles and rules in terms of which public authority must be exercised. Its aim is to curtail authority and to prevent the arbitrary, random and unpredictable exercise of authority. In terms of the premises of constitutionalism, binding principles and rules are laid down for the lawful public exercise of authority. The integrity of the principles is inherently protected to the extent that its alteration or abrogation is placed beyond the reach of those wielding political power. Due to their inviolability, those principles enjoy the status of a *higher* or *fundamental* law.

Medieval constitutionalism can be regarded as a difficult subject for at least two reasons:

Firstly, the era associated with medieval constitutionalism stretched over a very long period. It commenced at the outset of early feudalism, after the disintegration of Charlemagne's empire in the mid-ninth century and lasted to the end of late feudalism at the turn of the thirteenth century, when the new political centralisation of power started to develop from the fragmented feudal system.⁶⁰ In fact, it lasted much longer, as fundamental medieval politics would still exert a very important practical influence until the middle of the early modern era. Although the concept of *Middle Ages* therefore suggests a single era, numerous historical periods are involved and, incidental thereto, also numerous and differing political and constitutional arrangements. One can thus not generalise about medieval constitutionalism out of hand.

⁵⁹ Berman (n 38 above) 395-6.

⁶⁰ Van Wyk & Spies (n 1 above) 147.

Secondly, during the English constitutional conflict of the seventeenth century, the content and implications of medieval constitutionalism and fundamental law was the subject of an intense struggle. Edward Coke, for example, relied heavily on the purported content of medieval fundamental law to combat the growing imperial absolutism of James I.⁶¹

Many regarded the validity of the perceived legal principles with scepticism and expressed the opinion that medieval constitutionalism appeared mythological⁶² or at least that too much authority was attributed to it.⁶³

With due allowance for these warnings, it would nevertheless appear to be correct to assert that medieval constitutionalism comprised the following conceptions:

- popular sovereignty;
- sovereignty of the law;
- that political authority owed its existence and legitimacy to a bona fide contractual relationship between the political leadership and the people;
- that law, either as natural law or custom (and later as common law), was a *permanent* and *unchangeable*, or at least slow-moving premise, which is not actively created, but merely found and afterwards articulated or promulgated.⁶⁴

These four conceptions are mutually intertwined and can thus be discussed collectively.

One finds the first report on popular sovereignty in Tacitus' observations about certain Germanic usages. Tacitus tells us that the Germanic kings did not wield arbitrary or absolute authority.⁶⁵ The

⁶¹ This aspect is discussed in more detail in 8.3.4.

⁶² JHM Salmon *The French religious wars in English political thought* (1979) 160 refers for example to the legend of the Gothic constitution.

⁶³ JW Gough *Fundamental law in English constitutional history* (1955) 14-15, 17. See also in general JGA Pocock *The Ancient Constitution and the Feudal Law* (1957).

⁶⁴ See for example CH McIlwain *Constitutionalism: Ancient and Modern* (1947) 67-123; AJ Carlyle *A History of Medieval political theory in the West* (1928) Vol III, IV, V, VI; FB Artz *The mind of the Middle Ages: An Historical Survey* (1980) 270-280; Salmon (n 62 above) 160-162; Gough (n 63 above) 13-48; W Ullmann *Medieval political thought* (1965) 145-158; P Vinogradoff *The legacy of the Middle Ages* (1926) 287-319; JP Verloren van Themaat *Staatsreg* (1956) 18-25; CP Joubert 'Die gebondenheid van die soewereine wetgewer aan die reg' 1942 5 *THRHR* 7, 33-41; JGA Pocock *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975) 16-24; Sabine (n 2 above) 202-223; A Vincent *Theories of the State* (1987) 77-118; See also in general Pocock (n 63 above); O Gierke *Political Theories of the Middle Ages* (English translation by RW Maitland) (1938).

⁶⁵ Tacitus *The Agricola and the Germania* (1970) 107.

responsibility for taking decisions on lesser matters was vested in the headmen who made decisions after deliberating matters. However, in respect of matters of greater importance the entire community was involved.⁶⁶

According to Germanic and early medieval thought, law attached to the community. This, however, did not entail that the community was the active creator of its law; on the contrary, law in the guise of fixed community customs was in fact rather a specific characteristic of the community concerned. In reality, law was not the product of the will of the community. As an inherent characteristic of the community, law would endure as long as the community existed.⁶⁷

The notion that law is a characteristic of the community corresponds with the idea that law is fundamentally permanent, and with the conviction that law is not created, but merely expressed – that is to say, articulated and promulgated.⁶⁸ Law is experienced as a cultural phenomenon closely intertwined with the community. Alterations to the law occur unplanned and unnoticed, just like changes and development in the community itself.

To declare that law is sovereign, at the same time implies that the community is also sovereign,⁶⁹ because law, as mentioned, is a characteristic of the community. Popular sovereignty inevitably implies that the exercise of authority, in every imaginable form, is subjected to the community's approval. The authorities – in medieval terms, the king or emperor, who stood in a consultative relationship with his council⁷⁰ – were obliged to apply the law that the community had agreed upon.⁷¹

During the Middle Ages, notions of popular sovereignty were adhered to throughout Europe and England and were *inter alia* again reformulated energetically during the sixteenth century. It later came under pressure due to conceptions regarding the divine right of kings and the absolutist elements of Roman law. These absolutist tendencies had the smallest impact in England, which explains why popular sovereignty lasted the longest in that country. In England, the belief was held that the king was also subject to the common law, that is to say, the general law of the land. The common law originated in communal custom.⁷² CP Joubert, an Afrikaans jurist, declares that the absolutist elements of Roman imperial law were never included in

⁶⁶ Tacitus (n 65 above) 101-2; Carlyle (n 64 above) Vol III 41, 45-46, 183-4.

⁶⁷ Sabine (n 2 above) 204.

⁶⁸ Verloren Van Themaat (n 64 above) 19 n 10.

⁶⁹ Joubert (n 64 above) 33.

⁷⁰ Carlyle (n 64 above) Vol III 67-9, 148, 154, Vol V 83.

⁷¹ Ullmann (n 64 above) 152-3.

⁷² Verloren Van Themaat (n 64 above) 22-3.

the reception of Roman private law. He refers to the Roman-Dutch writer, Groenewegen, who declared that the absolutist principle of *princeps legibus solutus est* had never been incorporated into the law of the Netherlands.⁷³

It is true that Roman law displayed strong absolutistic tendencies and, as I shall argue in chapter 3, that it gave impetus to the development of absolutism in Europe at a later stage. However, another tradition in legal development that emerged since the time of the Glossators is worth mentioning.⁷⁴ In terms of this certain texts in Justinian's *Corpus Iuris Civilis* were interpreted to support the concept of popular sovereignty.

According to this tradition the imperial authority's source of legitimacy was the will of the people, as expressed in a contract in terms of which the people *conditionally* transferred its authority to the emperor and *conditionally* subjected itself to the emperor.⁷⁵ The *populus* still remained superior to the *imperator*; the *populus* retained its sovereignty (*imperium*) and could resume its exercise of authority at any stage.⁷⁶

Otto Gierke explains how some Glossators constructed a pure form of popular sovereignty from the *Corpus Iuris Civilis*. The people remain sovereign and only relinquish the exercise (*usus*) of their sovereignty to the emperor in terms of an agreement with the emperor. Should the emperor fail to honour his contractual obligations, the legal basis of such *usus* will fall away and the people would be entitled to cancel its agreement with the emperor and to relieve the emperor of his duties.⁷⁷ The source of sovereignty is the *populus* itself and this explains the use of the term *popular* sovereignty.

The next central concept of medieval constitutionalism that requires closer attention is sovereignty of the law. There is absolutely no justification for the view that political authority was exercised arbitrarily during the Middle Ages. Carlyle explains that the sovereignty of the law was so well established that it was utterly unthinkable that the exercise of political power could take place in its absence.⁷⁸ The principle of legal sovereignty, or rather supremacy of

⁷³ Joubert (n 64 above) 47. The reception concerned mainly private law (and not all of it) and clearly did not include public law. See for example W de Vos *Regsgeschiedenis* (1992) 52 *et seq.*

⁷⁴ The Glossators took the lead in the renewed study of the Roman law of the *Corpus Iuris Civilis* in the period 1100 to 1260. In this regard, see for example DH van Zyl *Geschiedenis van die Romeins-Hollandse Reg* (1983) 8 *et seq.*

⁷⁵ Gierke (n 64 above) 40; Joubert (n 64 above) 19-22.

⁷⁶ Gierke (n 64 above) 43-44.

⁷⁷ Gierke (n 64 above) 45-46.

⁷⁸ Carlyle (n 64 above) Vol III 38, 184; Vol V 36

the law, which is also ascribed to the Germanic tribes,⁷⁹ means that official authority is based on law and that all forms of the exercise of authority are subject to legal criteria. These criteria also applied to the Pope's exercise of authority.⁸⁰

Regarding the purport and content of the sovereign law, Continental and English conceptions varied in some measure. Continental conceptions were more notional and rational, as sovereign legal principles were often associated with natural law. Rationalism should, however, not be accepted too readily, as even the so-called rationalistic natural law did not find its origins in human reason but in communal customs and convictions, or was inspired by routine experience.⁸¹ The English species of legal sovereignty was, in turn, strongly reflected in the established customs of the commonwealth – in time the common law of the land – and served as the sovereign criterion for the validity of official acts.⁸²

Gierke quotes an impressive array of authorities in respect of the Continental trend, from philosophical sources to the works of the Commentators on the *Corpus Iuris Civilis*. These clearly demonstrate that the main stream of medieval legal and political theory regarded all official acts that were contrary to natural law to be formally invalid.⁸³ Judges had to treat all statutes and official acts that contravened natural law as invalid. Such acts were also invalid in respect of individual persons who were affected by them. Where official conduct was of a tyrannical nature in any way, individuals who bore the brunt of such conduct were fully entitled to resist the authorities.⁸⁴ The difference between a tyrant and a true prince was in fact one of the most stereotyped distinctions of medieval politics and constitutional thought, with the prince being, by definition, subject to the law as reflected in communal custom, whereas the tyrant disregarded it.⁸⁵

Sovereign law did not merely hold the status of ethical norms.⁸⁶ Constitutional principles were regarded as proper law and could

⁷⁹ Verloren Van Themaat (n 64 above) 24; Salmon (n 62 above) 160. Gierke (n 64 above) maintains that the Germanic notion of state was that of the Rechtsstaat.

⁸⁰ Gierke (n 64 above) 45-46.

⁸¹ As to this, cf AP d'Entrèves *Natural Law* (1970) 52.

⁸² A Vincent 1987 77-80 explains that the ancient constitution was an important variant of the doctrine of constitutionalism. It functioned as an autonomous conservatism, which derived its authority exclusively from the traditions that had existed from time immemorial. One can trace this opinion, for example, in the thought of Edmund Burke. See further Pocock (n 63 above) 16 *et seq* who describes how it was argued in terms of the ancient constitution that the more antique a right is, the more it is entrenched against infringement.

⁸³ Gierke (n 64 above) 84; 174 (note 257); 179 (note 273).

⁸⁴ Gierke (n 64 above) 84; 143-144 (notes 129-130).

⁸⁵ Vgl. Carlyle (n 64 above) Vol III 115-6, 184.

⁸⁶ Gierke (n 64 above) Gierke (n 64 above) 85.

actively be applied to combat unlawful conduct. The preferential status of sovereign legal principles originated in the conviction that such principles existed autonomously and were not created by the political authorities (the state). On the contrary, it preceded the political authorities.⁸⁷

In practice, the principle of sovereignty of the law found its origin in the coronation address. In that solemn declaration of oath, the king subjected himself to the law, including the common law, and bound himself to its protection.⁸⁸ When the feudal era had run its course and authority became centralised in the person of the monarch, a need arose to take new measures to entrench legal sovereignty and to keep the emerging monarchs subjected to the law, notwithstanding their relatively important position vis-à-vis the nobility (and the populace). It is for this reason that not only the famous *Magna Carta* was adopted in England in 1215, but also similar constitutional prototypes elsewhere such as the *Charter of Lyon* in 1188, the *Charter of Culm* in 1233, the *Joyeuse Entrée* in the Netherlands in 1356,⁸⁹ and the *Hungarian Golden Bull* in 1222.⁹⁰

In England there was a long tradition of exponents of the sovereignty of the common law which included figures such as Henry Bracton, John Fortescue, Thomas Smith, Richard Hooker and of course, Edward Coke.

The English jurist, Bracton (died 1268), wrote in a typically medieval and strongly religion-inspired style. His work often causes difficulties in interpretation due to what appears to the modern reader to be incomprehensible contradictions.⁹¹ On the one hand he published his famous statement in favour of legal sovereignty and against monarchical absolutism by declaring the king to be subject to the law.

For the king has no other power in his hands since he is the minister and vicar of God save that alone which he has of right (*de jure*). Nor is that to the contrary when it is said *quod principi placet legis habet vigorem*, for there follows at the end of the law *cum legis regia quae de imperio*

⁸⁷ Gierke (n 64 above) 74-75.

⁸⁸ Carlyle (n 64 above) chapter 20; Sabine (n 2 above) 207-208; Artz (n 64 above) 278; Joubert (n 64 above) 38. The importance of the coronation address is also reflected in the feudal *Sachsenspiegel* in Germany (Carlyle (n 64 above) 3; 40 in which it is stated that, immediately following his coronation, the king was obliged to take an oath that he would protect the law of the realm. According to Van Zyl (n 74 above) 69 the *Sachsenspiegel*, which contained the law of the Saxon tribe, was published around 1215-1235, i.e. in the same period that the laws of the other Germanic tribes were recorded in writing.

⁸⁹ K Stern 'The genesis and evolution of European-American constitutionalism' (1985) XVIII CILSA 187, 189.

⁹⁰ JH Mundy *Europe in the High Middle Ages* (1973) 405-6.

⁹¹ McIlwain (n 64 above) 72.

eius lata est (together with the *lex regia* which has been laid down concerning his authority). Therefore it is not anything rashly presumed by will of the king, that what has been rightly defined with the king's authorization on the advice of his magnates after deliberation and conference concerning it.⁹²

In contrast to this, however, he also stated that the king was not amenable to any human volition and was free to govern according to his own judgment.⁹³

McIlwain resolved this inconsistency by referring to two basic distinctions that existed in terms of medieval constitutional thought. First of all, there was a distinction between government (*gubernaculum*) and jurisdiction (*jurisdictio*).⁹⁴ Secondly, a distinction existed between administrative procedural measures and the demarcation, or definition, of rights.⁹⁵ *Government* deals with the preservation of order in the community. It is the *raison d'être* of monarchism. Within the field of *government* the king may act according to his discretion.⁹⁶ In respect of *jurisdiction*, however, which concerns the definition of the rights of the citizenry, the position is completely different. In this field the king is obliged to act in terms of the law, otherwise his actions are *ultra vires* and consequently void. In the latter, no absolutism applies and on this level, the undertaking to honour the law, which was given during the oath of coronation, was rigidly enforced.⁹⁷ This distinction, which reminds one of the modern difference between the legislative and executive spheres of government, preserved the principle of legal sovereignty.

Although he applied different terms, the English jurist, John Fortescue (1390-1479), drew the same substantial distinction as Bracton and also shared the latter's convictions.⁹⁸ JGA Pocock, with extensive reference to Fortescue, was of the opinion that medieval convictions on constitutionalism had strong republican undertones. To his mind, law and government were based on the customs and conventions of the total community over a long period of time. It was neither based on notional reason, nor determined in a deductive and rationalistic way, but founded in everyone's collective experience. The longer a custom exists, the greater it is in quality. Legislation (and the administration of justice through the courts) should not be subject to the king's powers, because these are not based on custom

⁹² McIlwain (n 64 above) 70; Joubert (n 64 above) 36.

⁹³ McIlwain (n 64 above) 72.

⁹⁴ McIlwain (n 64 above) 67-80.

⁹⁵ McIlwain (n 64 above) 82-83.

⁹⁶ McIlwain (n 64 above) 84.

⁹⁷ McIlwain (n 64 above) 85.

⁹⁸ McIlwain (n 64 above) 89-90.

and experience. Experience and custom form the basis of a democratic republican government.⁹⁹ Accordingly, Fortescue argued that the English monarch could only legislate and raise taxes with parliament's consent and, in terms of their oath of office, judges were obliged to apply the law, even when the king issued orders to the contrary.¹⁰⁰

Fortescue specifically refers to the Roman law-based volition theory, which had been gaining ground in Europe at the time. (See chapter 3). This Roman based principle originated in the Dominate, namely the later absolutistic period of the Roman Empire, and in terms of this, whatever pleased the emperor was regarded as law. (*Quod principi placuit, legis habet vigorem*). This principle, however, was not received into English constitutional law and the monarch has remained subject to the law.¹⁰¹ The extent to which the English common law did indeed have the status of fundamental law and was applied as a criterion for determining the validity of the monarch's conduct, remains a controversial question.¹⁰² All the same, according to Fortescue (and Bracton) it was evident that the principles of popular and legal sovereignty and the concomitant judicial power of review (although in rudimentary form) were already passionately cherished in English legal thought. Sir Thomas Smith (1542-1577), Richard Hooker (1553-1600) and Sir Edward Coke (1552-1634) are later exponents of this old English tradition.¹⁰³

An important characteristic of early medieval constitutionalism is that it had a contractual element. An intimate relationship of mutual dependency and assistance existed between the lord and his vassals, which was arranged between them contractually. At first glance it would appear that a personal relationship, on the one hand, and a contractual arrangement on the other, are incompatible.¹⁰⁴ However, feudal relationships were fundamentally contractual in nature. In terms of these relationships a vassal owed his lord certain duties, provided that the latter would honour his reciprocal obligations towards the vassal.¹⁰⁵

An important characteristic that this contractual relationship and popular and legal sovereignty have in common, is their contra-absolutistic nature. In terms of his contract with his vassals, the king was not at liberty to act according to his will. He was bound by the

⁹⁹ Pocock (n 64 above) 9-30.

¹⁰⁰ Joubert (n 64 above) 37.

¹⁰¹ Joubert (n 64 above) 38.

¹⁰² See for example Gough (n 63 above) 12-48, as well as the discussion of judicial review in chapter 8.

¹⁰³ Joubert (n 64 above) 38-41.

¹⁰⁴ Carlyle (n 64 above) 21.

¹⁰⁵ Carlyle (n 64 above) 21

agreement and his vassals owed him allegiance only insofar as he honoured their agreement. If the monarch or lords were to breach the agreement, the vassals were entitled to resile from it.¹⁰⁶

In time, this feudal, contract-driven monarchy was challenged by an absolutistic-theocratic form of monarchy (contained in notions like the divine rights of kings and later in secular royal absolutism). According to the former, the king stands in a contractual relationship with his subjects, in terms of which he can only create law with their consent. The latter entails that the monarch rises above and beyond society, enabling him to create law in an unfettered and arbitrary fashion.¹⁰⁷ The Magna Carta reflects the contractually founded nature of the feudal monarchy.¹⁰⁸ The difference between the erstwhile feudal relationship and the later impersonal legalistic relationship between those owing allegiance and the state, is to be found in the personal relationship between vassal and lord.¹⁰⁹ The feudal relationship differed greatly from the statist relationship:

It was an element that was very difficult to reconcile with the national idea and with the national constitution.¹¹⁰

In addition to what has been touched on above, one should of course also refer to another – probably the most formalised – constitutional ruling of medieval Christendom in Western Europe, namely the constitutional arrangement¹¹¹ that existed between the ecclesiastic and temporal spheres of power: in particular the relationship between church and empire. This relationship formally came into being during the *papal revolution*. This revolution¹¹² originated in the early papacy of Pope Gregory VII (Hildebrand, pope: 1073-1085) and came to an end with the Concordat of Worms in 1122. Prior to the revolution, emperors often appointed and dismissed popes. They also appointed other important clerical officials. They convened synods of the church under their chairmanship and in some instances even issued canons of both a theological and a legal nature.¹¹³ In the mid-

¹⁰⁶ Ullmann (n 64 above) 147.

¹⁰⁷ Ullmann (n 64 above) 146-8.

¹⁰⁸ Ullmann (n 64 above) 149-150.

¹⁰⁹ See the discussion of high treason in chapter 9.2.

¹¹⁰ Carlyle (n 64 above) 28.

¹¹¹ I fully agree with Harold Berman that a constitutional arrangement is at hand here. Not only the exercise of power within the church (in terms of canon law), but in particular also the division of power between the church and the empire, was arranged as a result of the papal revolution. The authority of both was delineated and restricted. It reflects all the characteristics of a true constitutional arrangement. As Berman (n 38 above) 213-214 asserts: 'The very separation between ecclesiastical and secular authority was a constitutional principle of the first magnitude, which permeated the entire system of the canon law.'

¹¹² Berman (n 38 above) 99 *et seq* explains in detail why it was indeed a full-scale revolution.

¹¹³ Berman (n 38 above) 484.

eleventh century, successive emperors had again started to exert a strong influence on the church. In addition to appointing senior clerical officials, a practice which the emperors had already been following for a considerable period at the time, emperors also dismissed successive popes and replaced them with popes of their choice.¹¹⁴ This progressively made the church an integral part of the empire and strongly reminds one of the inferior position in which the Eastern Orthodox Church of Constantinople found itself vis-à-vis the empire. In the years preceding the papacy of Gregory, opposition against this mounted from the ranks of the church.¹¹⁵ When Gregory was finally elevated to the papacy, he promptly issued a papal decree (*Dictatus Papae*) under which the church *liberated* itself from the empire and the emperor. In terms of the decree, the pope would be elected without any imperial mandate by the senior clergy, whilst the election of senior clerical officials would fall within the jurisdiction of the pope and be pertinently excluded from the emperor's jurisdiction. By appealing to what the position of the church would have been earlier,¹¹⁶ in contrast to the freedom that it later renounced in favour of the empire, the pope endeavoured to establish the integrity of the church as a corporate structure, free from the power of temporal authorities. Under the leadership of Emperor Henry IV, the empire opposed this decree and declared Gregory to be, amongst other things, a false pope. Gregory, in turn, retaliated by excommunicating Henry. With his position weakened by the desertion of his allies who joined the ranks of the pope, Henry was ultimately forced to yield. The conflict between the pope and the emperor – successors to the two initial antagonists – ended in a compromise in 1122, with the Concordance of Worms. This compromise established the *freedom of the church* and finally settled the constitutional arrangement for the *Repubblica Christiana*: following this, there would be a clearly defined division of power between empire and church, although the two entities would simultaneously cooperate as components of one unit, comprising empire and church. The doctrine of the two swords had, in reality, already been in existence long before the papal revolution. However, it was now formulated anew. Earlier it entailed the relationship between the temporal and heavenly spheres in which Christians found themselves. In this relationship, the church merely comprised the parish of (temporary)

¹¹⁴ In fact, in the century preceding 1059, when the church opposed lay investiture for the first time, the emperor appointed 21 of the 25 popes of that period himself and he also dismissed several. See Berman (n 38 above) 91.

¹¹⁵ A church council that was called by Pope Nicolas II, decreed for the first time in 1059 that the pope had to be elected by the cardinals. See Berman (n 38 above) 94.

¹¹⁶ In typical fashion, the legitimacy of this papal revolution, similar to that of subsequent revolutions like the Lutheran revolution, was sought in the practices of the ancient past. The revolution was therefore regarded as a restoration (and correction) of a bygone order. See Berman (n 38 above) 112-3.

pilgrims progressing towards a final, everlasting salvation. Henceforth it attained a political and, more specifically, a constitutional nature in the sense that it effected an arrangement between church and empire – pope and emperor. The church, in its capacity as a temporal corporate political and legal entity, carried the spiritual sword, which was not only concerned with the great beyond. In addition, it exerted authority over a plethora of earthly matters, like the control of church property, the activities of the clergy, family relationships, business morality and the like.¹¹⁷

In this way the church consolidated its position and, on account of the efforts of Gratian, *inter alia* acquired its own legal system – canon law. The establishment of the church's own legal system clearly signifies the autonomy of the church, divorced from the empire.¹¹⁸ On the other side stood the empire. Although the empire, as an integral part of the totality of empire and church, was by its nature a Christian empire, it could, in view of the church's autonomy over religious matters, concentrate on temporal matters – politics. On proper analysis, something in the nature of a constitutional arrangement was somehow reached between church and empire. This arrangement came under pressure with the rise of dynastic states. It finally broke up with the establishment of territorial states and the Lutheran Reformation, which will be discussed in chapter 3.

As part of the church's claims against the emperor, Gregory VII also declared that the pope had the capacity to express judgments in respect of both ecclesiastical and temporal matters. Innocent III (pope: 1198-1216), probably the most powerful of all popes, maintained that in their capacity as the successors to Saint Peter, popes had jurisdiction over all religious and temporal matters concerning the adjudication of sin. He regarded the temporal authority of the emperor as completely inferior to the pope's authority, as it was the pope who had transferred the imperial crown of Byzantium to the West and was responsible for the fact that the emperors could exercise their authority by the grace of the pope.¹¹⁹ Although the temporal powers exercised by Innocent III was never to be surpassed by any other pope, papal political claims reached a theoretical pinnacle during the papacy of Boniface VIII (pope: 1294-1303), when the Bull *Unam Sanctum* was promulgated in 1302. In terms of this decree, all temporal (political) authority had to be exercised under the supervision of the pope.¹²⁰ Furthermore, the theologically dominant way of thinking of the Middle Ages bolstered the church's political claims. According to this school of thought, God

¹¹⁷ Berman (n 38 above) 521.

¹¹⁸ Berman (n 38 above) 202-3.

¹¹⁹ Copleston (n 42 above) 294.

¹²⁰ Copleston (n 42 above) 303.

did not create man for the world, but for the life hereafter, and it was the church's obligation to accomplish the realisation of this objective.¹²¹

¹²¹ Copleston (n 42 above) 295.

CHAPTER 3

DECLINE AND PREPARATION: THE DEPARTURE OF THE *REPUBLICA CHRISTIANA* AND THE ADVENT OF STATISM

1 Secularisation, Renaissance and Humanism

As explained in chapter 2, the papal revolution of the late eleventh century emancipated the church from the empire – the temporal political authority. By implication, however, the same revolution provided the impetus for the empire to rid itself of the church and can be regarded as the basis of political secularisation, which in turn proved to be a contributing factor to the development of the territorial state.¹

Since the late Middle Ages in particular, a concurrent process of individualisation, secularisation, state creation and mercantilism commenced in earnest.² The development of the state and the accompanying statist logic are the products of secularisation,³ which rejected religious and spiritual subordination to the church and heralded a way of life free from religious regulation and ecclesiastic control.⁴ Against the background of the wholly religious attitude and lifestyle of the medieval *Republica Christiana*, discussed in chapter 2, it is quite evident that the creation of statism had to be preceded by a profound process of secularisation. During the medieval era, religion was so enveloping and permeating that a mere constitutional adaptation, in the sense of a mechanical amendment of the politico-juridical rules, would have been insufficient for the founding of the territorial state and statism. That which was necessary to happen and which did in fact happen, is aptly expounded as follows by E-W Böckenförde:

... the detachment of the political order as such from its spiritual and religious origin and evolution; with its becoming temporal in the sense of

¹ See in general HJ Berman *Law and revolution: The formation of the Western legal tradition* (1983).

² E Bodenheimer *Jurisprudence: The philosophy and Method of Law* (1962) 32-34.

³ E-W Böckenförde *State, Society and Liberty* (translated from the original German by JA Underwood) (1981) 26 *et seq.*

⁴ Böckenförde (n 3 above) 27.

quitting an ostensibly homogeneous and religious and political context to find an aim and identity of its own, conceived in secular terms (a 'political' aim and identity); and finally with the separation of the political order from Christian religion and from any specific religion as the foundation and haven. This development too, forms part of the emergence of the state. In fact, without this aspect of the process, it is impossible to understand the state as it has evolved and as we see it today, or to grasp the fundamental problems of political organization that face the present-day state.⁵

Therefore, the establishment of the state and the reaching of the destination of statism followed the path of secularisation. The forces that prepared the way were the spirit of the Renaissance and humanism, the political philosophy of this transitional period, the development of the absolutist trend in Roman law, the decline of the politically divided political order of feudalism in favour of the centralising dynasties and the breach of ecclesiastic unity (the Reformation). The combined effect of these factors was the semi-secularised⁶ dynastic state, which emerged in the mid-sixteenth century.

During the timid, shy and introspective Middle Ages, mankind fixed its gaze on the heavens above. The human mind was open and susceptible to divine revelation. In the extroverted – the outgoing – Renaissance, this gaze shifted horizontally towards mankind and the world. In an atmosphere of human confidence, the intellectual focus shifted to what man had to say, instead of remaining fixed on *divine* revelation, as before.

While the medieval way taught the unimportance of life, stressed its snares and evils and smothered the individual with a host of confining rules and prohibitions, the Renaissance beckoned man to enjoy beauty, to savour the opportunities of this world and to be himself regardless of restraint.⁷

Humankind itself now became the object of interest, as demonstrated by the emergence of various new genres during this period: the writing of biographies, poetry, recording of history and in addition, the development of the fine arts. Many outstanding personalities distinguished themselves by their work.⁸ Of cardinal significance was the fact that human life had regained its value and

⁵ Böckenförde (n 3 above) 27.

⁶ At the conclusion of this chapter, there is an explanation of why this state had not completed the full secularisation course, and what was necessary to enable it to complete the route.

⁷ E Wallback *et al* *Civilization past and present* Vol VI (1981) 401.

⁸ K Vorländer *Gechiedenis van de wijsbegeerte* Vol II (1955) 129.

importance. The Renaissance experienced an optimistic joy of life in contrast to the medieval obsession with death.⁹

There was also reason to be optimistic and happy, for human achievement at the time was unparalleled and unequalled: a sea route to India was discovered, a New World appeared on the world map with the European discovery of the Americas, and natural science the fine arts, exciting Renaissance architecture and literature written in the national languages were established.

The driving spirit behind the Renaissance was threefold: the rediscovery of the Classic heritage (both Grecian and Roman), secularisation and individualism.¹⁰ The new spirit was inspired by an interest in the Classics; secularisation described the nature of the newly-recognised values; individualism expressed the way in which the new values were experienced and pursued.¹¹ Of course, religion did not completely vanish into oblivion overnight, but gave up its generally superior position. However, the human-centred and world-centric atmosphere of the Renaissance caused the religion-inspired medieval unity and universality, as discussed in the previous chapter, to start disintegrating. The most important contribution of Humanism is probably the fact that it caused a breach with the scholastic traditions of education and incorporated the rediscovered Antiquity into Western culture and in doing so, also helped preparing the way for the successful conclusion of the Reformation.¹²

The Renaissance and Humanism, which dominated the cultural climate from around the second part of the fourteenth century to the mid-sixteenth century, prepared the framework within which specific aspects of secularisation, like the territorial state and statist logic could materialise.

A number of important social changes during the Renaissance had helped to pave the way for statism: the development of the cities and the emergence of the middle class, who often found themselves in an alliance with statist monarchs against the church; the invention of the printing press in the mid fifteenth century and the resultant mass spreading of ideas.¹³ In addition, since the mid-fifteenth century Europe saw the establishment of many universities, which would eventually act as the cradle of new ideas and of revolution.¹⁴ The

⁹ F Braudel *A history of civilizations* (translated from the original French by R Mayne) (1993) 348.

¹⁰ G Runkle *A history of Western political theory* (1968) 167-174.

¹¹ Runkle (n 10 above) 174.

¹² GR Elton *Reformation Europe* (1963) 63.

¹³ P Smith *The reformation in Europe* (1962) 16-19.

¹⁴ Smith (n 13 above) 21.

religious reformations of Wyclife, Huss and Martin Luther all found their origins in the new universities.

2 Political and legal thought

The political thought and legal theory of the late medieval period and the Renaissance, which are hardly distinguishable from one another, produced two themes that are especially important for present purposes.¹⁵ First, this era is characterised by the conflict pertaining to the relative powers of state and church. (When one refers to the state of this period, the reference is naturally to the state in its undeveloped and rudimentary form). Secondly, the pope's almost absolutistic position of power was challenged from within the church. This caused the gradual fading away of the ecclesiastical (papal) claims to political power. This was beneficial to the state, for the church's loss of political power signified the state's gain of political power. At the same time, the notion of popular sovereignty gained considerable support from within the ranks of the clergy. This was in line with the trend in favour of popular sovereignty, which remained strong throughout the course of the Middle Ages, as explained in chapter 2.

The Bull of Boniface VIII (pope: 1294-1303) (see chapter 2.2.) represents the turning point of papal (and ecclesiastic) claims to political supremacy.¹⁶ After that the papal authority started to wane. This was caused by the pope's political defeat at the hands of the French king, Philip V, and also by the ecclesiastic schism, the rise of political philosophy during the Renaissance and of course, the establishment of the political power of the new territorial state.

The rediscovery and popularity of Aristotle's political philosophy was a strong impetus for the establishment of a political domain, free from ecclesiastic regulation. Aristotle regarded man as a political being and politics as a natural institution, since it was a necessary prerequisite for human self-fulfilment.¹⁷

The work of Dante Alighieri (1265-1321), or simply Dante as he is generally known, represents an important moment in the creation of a liberated political domain. For Dante, who had also been influenced by Aristotle, the ideal state was of a *temporal* nature. In terms of his view, the temporal state should also be governed to the advantage of

¹⁵ See in general the leading works of RW Carlyle *A history of medieval political theory in the West* Vols IV, V, VI. (1928); Q Skinner *The foundations of modern political thought* (1978) Vol I.

¹⁶ W Ebenstein *Great political thinkers: Plato to present* (1969) 261.

¹⁷ FCA Copleston *A history of medieval philosophy* (1975) 298.

its citizenry. It is noteworthy that Dante did not utilise the concept of *theological virtue* in any measure,¹⁸ but rather accepted the political virtue of the ancient world as his point of departure. Dante rehabilitated temporal political activity and thereby widened the schism with that medieval tradition, which had been inimical towards the temporal nature of politics.¹⁹ On the radicalism of Dante's deviation from medieval thought, PB Clarke states:

Prior to Dante politics had been at best an evil necessity forced upon 'man' by virtue of the expulsion from the paradisiacal condition and the necessities that followed from living in the fallen state. Dante turned this entire model on its head. The moment of expulsion which the Christian meta-narrative had made definitive of the human condition became a moment not of regret but of celebration. And at its centre was willing, acting, being political and enjoying that activity and condition for its own sake.²⁰

According to Dante a temporal political structure – for Dante, a universal empire – was a necessary ingredient for man's well-being. A temporal authority had to keep the peace. Dante argued – noteworthy for his time – that temporal authority was derived directly from God. Accordingly, there can be no temporal authority over the emperor and therefore the emperor did not derive his authority from the pope, who stood between God and the emperor.²¹ Dante was still a long way from statism. His doctrine still regarded God as the source of authority and justified it from a religious perspective. In addition, he was still thinking in terms of a universal empire. Nevertheless, he formulated an important argument in favour of the autonomy of politics, free from ecclesiastic discipline and therefore to the advantage of secularism. Dante's plea in favour of temporal politics conflicted with the far-reaching ecclesiastic claims of Boniface. It provided an indication of a deep-rooted tension between church and 'state'. Where a general Christendom had previously been referred to, without clearly distinguishing between state and church, by the fourteenth century this became impossible. The concept of a general Christendom had come under pressure.

Marsilius of Padua (1275-1343) joined Dante as part of the transition from the Middle Ages to the modern era. Marsilius,

¹⁸ Runkle (n 10 above) 147-150.

¹⁹ PB Clarke *Deep citizenship* (1996) 64. This view is probably somewhat exaggerated, because it does not take account of Dante's conviction that all power is derived from God. The democratic undertone of the statement is also probably not correct, as it is not in accordance with Dante's monarchical convictions. Nevertheless, it demonstrates the break with the medieval religious hegemony.

²⁰ Clarke (n 19 above) 64.

²¹ Copleston (n 17 above) 302.

however, was a much more modern figure than Dante.²² Marsilius, who hailed from Florence, was also a follower of Aristotle. He regarded the state as political society as a natural given, whereas the church had to resort under political authority in the interest of preserving the peace.²³ Although Marsilius' arguments were also based on the scripture, he did not focus on theological contemplation, but rather on the total autonomy of the state – of politics. He was focussed on the autonomy of the state. Such autonomy could only be attained with the rejection of the church as a supra-national political institution and its relegation in status to a department of the state.²⁴ Marsilius is an authentic exponent of temporal politics, as he reduced the role of the church to little more than a provider of social services and the creator of moral and spiritual circumstances which could facilitate the political duty to govern.²⁵

Within the church the papal *plenitudo potestas* (absolute authority) also elicited growing opposition. This ultimately gave rise to the Conciliar Movement of the fourteenth century. This movement can be regarded as one of the most prominent expressions of medieval constitutionalism.²⁶ As the discussion of the papal revolution in chapter 2 indicates, a constitutional tradition in the church can be traced back to the late eleventh century. Therefore, the Conciliar Movement was not the origin of constitutionalism in the church. It was associated with a tradition that had already been established. The gist of the Conciliar Movement was that the church is a corporate communal entity of the faithful, in which everyone – both laymen and clergy – participated equally. Ecclesiastic governance should also be managed, at least in some part, by councils in which the ordinary members of the church are represented. Bartolus de Saxoferrato (1313-1357), the Romanist jurist and most prominent scholar of the Post-Glossators, exerted a strong influence on the Conciliar Movement. He maintained that the transfer of power by the people to the rulers had not been absolute. It was not unconditional. It was indeed conditional in the sense that the people were still vested with the residual powers to resume the actual exercise of authority.²⁷ Exponents of this popular notion of sovereignty were the predecessors as well as the most prominent spokesmen of the Conciliar Movement,

²² Ebenstein (n 16 above) 265.

²³ Copleston (n 17 above) 309.

²⁴ Copleston (n 17 above) 309.

²⁵ Copleston (n 17 above) 312-313. Many other writings in support of the king's authority appeared in this period, for example that of Pierre du Bois (died: 1322) who argued in favour of the superiority of secular state authority. See Artz *The mind of the Middle Ages: An historical survey* (1980) 126).

²⁶ JN Figgis *Political thought from Gerson to Grotius, 1414-1625* (1960) 41, 47.

²⁷ AJ Antonitus 'Die filosofie van die konsiliebeweging' in AM Faure *et al* (eds) *Die Westerse politieke tradisie* (1981) 139.

like Jean of Paris, William of Ockham, Durandus, Pierre d'Ailly, John Gerson, Zabarella and Nicolas de Cusa.²⁸

In terms of exerting an influence in concrete structures, the Conciliar Movement was unsuccessful and papal absolutism was largely restored. The failure of the Conciliar Movement to oppose the pope and establish a measure of federalism in ecclesiastic governance created an opportunity for the later Reformation, which had much more radical implications, namely to ultimately destroy the unity of the Western church and thereby paving the way for the establishment of (secular) state authority. Neville Figgis points out that the failure of the conservative change, which Gerson advocated in his capacity as spokesman for the Conciliar Movement, necessitated the revolutionary option of Calvin's reformation and enabled it to materialise.²⁹

Notwithstanding the political failure of the Conciliar Movement *within* the church, it strongly influenced the relationship between state and church. It weakened the position of the church vis-à-vis the state.

The universities further contributed to the trend opposing the temporal authority of the church. Prominent personalities in this respect were John Wyclife³⁰ (1320-1384) of Oxford and John Huss (1369-1415) of Prague. Wyclife had such a high regard for the dignity of the church that he was convinced that the church should not concern itself with temporal matters at all. Should this happen however, the state should take over control of such conduct. This doctrine of dignity in effect reinforced the state in the form of the monarchy against the pope's claims.³¹ Wyclife's aversion to the church as a property owner³² had the same effect. Furthermore, Wyclife championed a national English church, which functions independently from the pope.³³ According to Wyclife and Huss, the church had to play an internal role for the sake of the chosen, whereas the external political terrain had to be preserved for the state. This school of thought is without a doubt the predecessor of the schism in the church that was caused by the Reformation of the sixteenth century.³⁴

²⁸ Antonitus (n 27 above) 140-144; Figgis (n 26 above) 41-71 and in particular 67-68. Figgis at 55 provides a more comprehensive list of the most eminent spokesmen.

²⁹ Figgis (n 26 above) 42-43.

³⁰ An alternative spelling is Wycliffe. See for example Wallback (n 7 above) 382.

³¹ CJ Wanlass Gettel's *History of political thought* (1953) 136-137.

³² T van Wyk & SB Spies *Western Europe from the decline of Rome to the Reformation* (1985) 298.

³³ Wanlass (n 31 above) 137.

³⁴ O Gierke *Political Theories of the Middle Ages* (English translation from the original German by RW Maitland) (1938) 19.

When shifting the focus more towards legal order, one finds that from the twelfth century, a renewed interest in Roman law developed, initially in Italy,³⁵ but eventually in nearly the entire Western Europe. It was indeed only in England that Roman law, to the relief of some English commentators, could never find a foothold and exert an important influence on politics and constitutional institutions. The failure of Roman law to find its way into England is in fact regarded as the main reason why absolutism was never permanently established in England, in contrast to France, where the influence of Roman law was profound.³⁶

Roman law notions from the Justinian codification of the sixth century exercised an important influence on the political thought of the Renaissance³⁷ and of the sixteenth century.³⁸ Nonetheless, Roman law was never (fully) adopted as positive law in this period, due to the powerful hold of customary law. It was, however, indeed a type of ideal law to which positive law should conform as much as possible.³⁹ Roman imperial law, as contained in the Justinian codification, does not provide an unqualified basis for imperial (or monarchical) absolutism. Arguments for and against royal absolutism were based on texts from the *Corpus Iuris Civilis*.⁴⁰ Nevertheless, it cannot be denied that arguments based on Roman law strongly supported the notion of royal absolutism, the monarch's legislative power and the centralisation of authority. In unison with other forces discussed in this chapter, it strongly supported the emerging territorial states with their increasing centralised exercise of authority.

Three texts from the *Corpus Iuris Civilis* in particular, presented themselves for an interpretation in favour of monarchical authority and absolutism.⁴¹

³⁵ DH van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1983) 62.

³⁶ See for example W Ullmann *Medieval Political Thought* (1965) 154-155; JP Verloren van Themaat *Staatsreg* (1956) 21; Q Skinner (n 15 above) Vol II 54-55.

³⁷ *Inter alia* on the political philosophy of the Conciliar Movement. See Antonitus (n 27 above) 139.

³⁸ See for example JW Allen *A History of Political Thought in the Sixteenth Century* (1928) 289 *et seq.*

³⁹ Berman (n 1 above) 204, 471.

⁴⁰ See eg Skinner (n 15 above) 129-133.

⁴¹ CP Joubert 'Die gebondenheid van die soewereine wetgewer aan die reg' (1942) 5 *THRHR* 18 also refers to a number of other texts of similar impact.

In the *first instance*, *Digest*⁴² 1.4 reflects Ulpian's statement that the ruler's will is clothed with the power of legislation: a royal decree has legislative power. The emperor was clothed with this legislative authority by virtue of the fact that the people had transferred such power to him.⁴³ Ulpian's statement as the positive law during the period in which the *Corpus Iuris Civilis* was compiled, was identically reflected in *Institutes*⁴⁴ 1.2.6.⁴⁵ The last and most controversial text, *Digest* 1.3.3.1, ascribed to both Ulpian and Papinian, declares that the emperor is not bound by the law⁴⁶ – therefore, he has absolute authority.

Medieval Romanist jurists (initially the Glossators, but especially the later, more sophisticated Commentators) differed on the nature of the people's transfer of power to the emperor. Some raised the argument that such transfer of power was not irreversible and merely a *concessio* – a conditional delegation of the *usus* of authority.⁴⁷ This meant that the people remained sovereign and could resume its exercise of authority at any stage.⁴⁸ What is noteworthy, however, is that the two most influential Commentators, Bartolus de Saxoferrato (1314-1357) and Baldus de Ubaldis (1327-1400), interpreted the Roman law position to entail that the people irreversibly relinquished their authority (sovereignty) to the head of state and thereby irretrievably lost its own legislative power.⁴⁹

Baldus was the most outspoken exponent of the Roman law-based absolutism. Baldus argued that it was the ruler who had to dispense justice. This obligation, however, is of a moral and not a legal nature. Should the ruler therefore fail to honour his moral obligation, there is

⁴² The *Digest* mainly reflects the views of the jurists of the golden age of the Roman law during the second and third centuries AD. See W Kunkel *An Introduction to Roman Legal and Constitutional History* (English translation from the original German by JM Kelly) (1973) 105, 169; DH van Zyl *Geskiedenis en beginsels van die Romeinse Reg* (1977) 31, 59. Ulpian was regarded as one of the five most prominent jurists of the classic period of Roman law and his opinions are thus of singular importance.

⁴³ See the original Latin text of *Digest* 1.4 of the *Corpus Iuris Civilis* Vol 1, as well as its translation into English (Latin text edited by T Mommsen & P Krueger and translated into English by A Watson) (1990).

⁴⁴ The *Institutes* was a more accessible textbook, which also formed part of the *Corpus Iuris Civilis*. It provided students with a summary of the law that was applicable in the Justinian period. See Van Zyl (n 42 above) 62-63; JAC Thomas *The Institutes of Justinian Text Translation and Commentary* (1975) vii.

⁴⁵ See the original Latin, as well as its English translation of this text by Thomas (n 44 above) 5-6.

⁴⁶ See the original Latin, as well as its English translation of this text by Mommsen & Krueger (n 43). Like Ulpian, Papinian was one of the five most prominent Roman law jurists.

⁴⁷ Gierke (n 34 above) 43; 150 (note 159).

⁴⁸ Joubert (n 41 above) 20-21.

⁴⁹ Joubert (n 41 above) 30; JA Wahl 'Baldus de Ubaldis and the foundations of the nation state' *Manuscripta* (1977) XXI 86 and especially 91; Gierke (n 34 above) 39, 43, 147 (note 142), 150 (note 158).

no legal sanction to force him to act appropriately.⁵⁰ In terms of the doctrines of both Bartolus and Baldus, the ruler observed the law of his own volition. The ruler was, however, under no legal obligation to act in accordance with the law.⁵¹ The absolutism described by Baldus is thus a form of enlightened absolutism, for although a good ruler will heed the popular voice,⁵² no concomitant legal obligation exists to that end.⁵³ Baldus' description of royal absolutism permanently entrenches the ruler's position of power. The reason for this is that the ruler does not exercise his authority on the basis of a personal (and inherently variable) relationship with his subjects, but through a fixed, immutable legal principle.⁵⁴ So what is crucial for Baldus, is not the (inherently variable) ruler's personal relationship with the people, nor the ruler's obligations towards his subjects, but rather the royal *office*, which is by nature a permanent and invariable legal fact.

In apparent contradiction to what has thus far been said about Baldus' opinion on royal absolutism, Baldus also teaches that the ruler is bound in law to honour the agreements of his predecessors.⁵⁵ Under this arrangement the ruler is directly associated with the state (the realm), which in turn means that the state acquires a permanent character – something that had not been known in Western Europe since the final fall of the Western Roman Empire in 476 AD. Besides, royal commitment to agreements is not contrary to the concept of absolutism, since absolutism, as indicated, is indeed founded upon an irrevocable agreement through which the people transferred their authority to the emperor. The legal source of absolutism is of a contractual nature, and for that reason it is legitimate.

A further aspect of Baldus' doctrine is that the ruler is subject only to God. He is accountable to the pope only insofar as spiritual matters are concerned.⁵⁶ The emperor occupies the highest office of authority with regard to temporal matters and also has the power to dismiss any official from office.⁵⁷

In conclusion, Roman law as interpreted by the Commentators acted as a stimulus for the emerging territorial state and state authority in two ways:

⁵⁰ Wahl (n 49 above) 87, 89.

⁵¹ Wahl (n 49 above) 89-90.

⁵² Wahl (n 49 above) 92.

⁵³ Wahl (n 49 above) 93.

⁵⁴ Wahl (n 49 above) 80.

⁵⁵ Wahl (n 49 above) 80, 82-84, 87.

⁵⁶ Wahl (n 49 above) 85.

⁵⁷ Wahl (n 49 above) 86.

First, it strengthened the position of temporal political authority to the detriment of papal (ecclesiastic) political claims to power. It links up with the social, political and philosophical trends of those times, which enhanced the reinforcement of the temporal political authority of the emerging territorial states.

Secondly, it designated the ruler (whether the emperor, or the monarchs of various medieval political entities) as the *locus* of political sovereignty and in this way rendered legal support to the ruler's claims to authority. Thus, the statist claim in the competition for political power against the church was favoured.

The Germanic view that law is not expressly ordained, but has always existed as sovereign law as an integral part of communal custom – popular usage – and could merely be 'found' there, also lost ground against the Roman law view that law is created according to the ruler's will. In medieval times, the Germanic views on popular sovereignty, together with their views on legal sovereignty, were prevalent. Eventually, however, it lost its popularity and authority partly due to the Roman law-inspired absolutism.

The views on the divine right of kings, as discussed in the fourth part of this chapter, which provided implicit theological support for royal authority and absolutism, found a secular ally in the Romanist legal trend which based its claims on ancient authority. Both were building blocks of the state and royal absolutism, and both, in their own way, stood equally inimical towards the political claims of the church. This favoured the emerging territorial states considerably.

3 State formation

Charlemagne did indeed have a vast empire. However, it differed from the modern territorial state in that it lacked a clear centre and capital city, as well as clear boundaries. As opposed to contemporary territorial states, it was not primarily a territorial entity – an entity characterised by fixed boundaries.⁵⁸ The same applied to the empire when it revived in the tenth century. The emperor was a ruler of people rather than someone governing a clearly defined territory. Furthermore, government was also rather haphazard and absent for long periods of time. Lacking an established bureaucracy, as in the heyday of the Roman Empire or in present well-functioning territorial states, government was on a loose footing and often absent for long periods. Government was dependent on the physical presence of the sovereign – or, the presence of his itinerant delegates (field agents).

⁵⁸ Berman (n 1 above) 89; 483.

The emperor was forced to move around constantly. Where the emperor or his delegates were, his authority temporarily held good; insurrections were quashed and conflicts resolved. As soon as they had left, government began to fade. His departure often also heralded the departure of the empire. According to Harold Berman the empire was no geographical unit, but rather a military and spiritual authority.⁵⁹ Dynastic states, which developed around monarchs and would eventually replace the empire (and side-track the universal church), suffered from the same ailments. They were, in particular, not territorial in nature.⁶⁰ It was also government over people and not really over a clearly demarcated territory.

Government by the emperor and the dynastic sovereigns was also not really over *all* people. In the context of the feudal order – the order in which the empire had been formed since the tenth century and within which the states had found their origin – the emperor did not really reign over everybody, but only over his immediate vassals, dukes, counts and similar nobility. Although the sovereign indirectly reigned over the subjects of his vassals, it was indeed the vassals themselves who governed their subjects. At that stage there was no sovereignty – characteristic of the territorial state of a later era. The political exercise of authority and sovereignty (if one wishes to utilise the word in a contrived sense) was divided – diffuse – and unstable. During the emergence of the cities of Western Europe, before the territorial state was finally established as the dominant new political order, political authority had temporarily been even more fragmented. It was reflected *inter alia* in an entire set of parallel legal systems, including feudal law, manorial law, urban law and royal law.⁶¹

With the advent of the fifteenth century an era of accelerated state formation dawned. A slow and barely discernable process of state formation had indeed been taking place when the French monarchs started to centralise authority, form rudimentary civil services, and develop standing armies during the twelfth and thirteenth centuries.⁶² In fact, it is asserted that the Norman kingdom in Sicily and Southern Italy under Roger II from 1112 to 1154, England under Henry II from 1154 to 1189, France under Philip August from 1180 to 1223 and a few other kingdoms had already been territorial states.⁶³ At least some of them were not permanent. What is clear, however, is that viable and sustainable state formation was getting

⁵⁹ Berman (n 1 above) 89.

⁶⁰ Berman (n 1 above) 297.

⁶¹ This is described in detail by Harold Berman. See Berman (n 1 above) 273-519.

⁶² See in general S Painter *The Rise of the Feudal Monarchies* (1951); RN Berki *The History of Political Thought: A short introduction* (1977) 116.

⁶³ Compare Berman's detailed discussion (n 1 above) 404-481.

into full stride in the early modern European period.⁶⁴ Before 1453 (the fall of Constantinople to the Ottoman assault and a date that is often quoted as the end of the Middle Ages), European states – in this period England, France and Spain – were still more feudal than sovereign and territorial. After 1559 (the Peace of Augsburg), however, they were more sovereign than feudal. Before 1453 these states could still be described as feudal monarchies, but the states that emerged after 1559 already displayed the characteristics of a sovereign state.^{65 66}

Where the later medieval period was characterised by a balance of power between feudal decentralisation and monarchical centralisation, between 1453 and 1559 the balance swung sharply in favour of the monarchy.⁶⁷ During this time, the monarchical (or dynastic) state became the dominant role player in global politics and the inter-European political order and consequently replaced the erstwhile dominant *Repubblica Christiana*.⁶⁸ A ringing example of the measure in which the monarch's authority had waxed, presented itself in 1527, when the president of the highest French superior court assured the French king, Francis I, that everybody acknowledged the maxim *princeps legibus solutus est* – that the king was not bound by the law.⁶⁹

Although the Italian Renaissance states were, in some regards, forerunners of the new statist era, due to the secular traits they displayed,⁷⁰ the French state – as a large geographical unit with all the typical developmental patterns that were characteristic of the emerging states of the time – was the typical model for state formation.⁷¹ State formation is based on the development of a

⁶⁴ Inevitably, this era was not demarcated by specific dates, but roughly spanned the period 1460-1559, according to the opinion of EF Rice *The Foundations of Early Modern Europe* 1460-1559 (1971), or 1450 to 1550 according to Van Wyk & Spies (n 32 above).

⁶⁵ Rice (n 64 above) 92.

⁶⁶ 1453 and 1559 are important historical dates, as they respectively refer to the fall of Constantinople and the Peace Accord of Augsburg.

⁶⁷ Rice (n 64 above) 93.

⁶⁸ Van Wyk & Spies (n 32 above) 230; HG Koenigsberger & GL Mosse *A general history of Europe in the sixteenth century* (1968) 2.

⁶⁹ Rice (n 64 above) 93.

⁷⁰ The Italian city states appeared on the historical scene for a brief period only. Furthermore, they were the product of extremely exceptional historical circumstances that did not form part of the main trend of European state formation. G Ritter 'Origins of the modern state' in H Lubasz (ed) *The development of the Modern State* (1964) 20 explains this as follows: 'The world of Italian Renaissance states is a freak, the product of unique political conditions and historical memories. The cradle of the great modern powers, of the modern national-power state is not Italy but Western Europe.'

⁷¹ It is *inter alia* illustrated in the discussion of F Chabod 'Was there a Renaissance State?' in H Lubasz (ed) *The development of the modern state* 26-42 from which it is clear that the French state (and not the city states of Northern Italy from the late medieval period and the Renaissance) paved the way for the territorial state.

permanent bureaucracy, standing army (or, in the case of England, a permanent navy), a general tax system, public policy supporting economic production and growth, the absorption of smaller and weaker political entities into larger and stronger units,⁷² the development of a national legal system (common law) as the dominant and even the only legal system, instead of the variety of legal systems of earlier times (feudal law, manorial law, the legal orders of a number of cities and, of course, canon law).⁷³ The territorial state also proceeded from the assumption that personal loyalty towards the former sovereign would be replaced by an impersonal abstract relationship between the government and the citizenry.

The emerging bureaucracy was no *civil* service in the modern sense, but indeed a royal bureaucracy – the king's officers.⁷⁴ The monarch appointed officials in person and he could dismiss them randomly, just as he could appoint them at his discretion. On the other hand, however, the bureaucrats had to conduct themselves according to the king's dictates.

The composition of the royal bureaucracy reflected the social changes as well as the political alliances of the time. Important offices were, for example, not awarded to the heads of important noble families, but to professional administrators from the emerging middle class, most of whom had received legal training at the universities⁷⁵ and were influenced by the absolutist conceptions constructed from the codification of Justinian.

A strategic alliance existed between the rulers of the emerging territorial states on the one hand, and the citizenry and tradesmen in the cities on the other. They had a shared interest in weakening the political power of the lesser vassals and avoiding the economic fragmentation caused by the feudal system's variety of monetary units, the payment of toll fees as well as a variety of weighing and measuring units and similar forms of economic fragmentation. The citizens and the tradesmen wished to avoid paying taxes to lesser vassals, just as they wanted to avoid the costs and trouble of toll fees

⁷² J Anderson & S Hall 'Absolutism and other ancestors' in J Anderson (ed) *The rise of the modern state* (1986) 32.

⁷³ In this context, compare the detailed discussion by HJ Berman 1983 405-519.

⁷⁴ Rice (n 64 above) 95-96.

⁷⁵ Ritter (n 70 above) 21-22; Van Wyk & Spies (n 32 above) 244, 248. The latter point out that a convergence of the interests of the monarch and the emerging citizenry occurred at the time. Louis XI of France, in particular, connived with the bourgeoisie. After the Hundred Years' War, during the course of which the last vestiges of English power was expelled from Europe, the bourgeoisie saw the need of a strong central authority, amongst others, to provide them with protection against the proletariat who were becoming increasingly restless. The bourgeoisie was also the source of the king's trained and devoted administrators.

and the previously mentioned forms of economic fragmentation. In order to further more efficient trade and greater profits, they wished for the largest possible economic units. They sought the answer to this in the centralised territorial state and therefore in loyalty towards the ruler, instead of a variety of lesser (feudal) nobles. The monarchs, on their part, sought alliances with precisely those who desired state centralisation and for whom the fragmentation caused by the feudal order was a source of irritation. They found these allies amongst the urban tradesmen and the bourgeoisie. It is against this background that one has to see the preference of the monarchs of the emerging territorial states (France, in particular) to employ people from the ranks of the urban citizenry in their royal bureaucracies.⁷⁶

The bureaucracy became so prominent that it ultimately developed into a fourth class, apart from the traditional medieval classes.⁷⁷ The development of this class already reflected a breach with the Middle Ages. Of even more importance, however, was the professional mentality of this class. They gave preference to state interests and thus gave impetus to the establishment of a statist logic by which the interests of the state would consistently be regarded as their first priority.⁷⁸

When mention is made of a royal bureaucracy, one should not endeavour to evaluate the concept from a modern perspective – namely, as a civil service that forms an integral part of the executive branch of government. In its ranks, the bureaucracy included the growing number of bureaucrats who were responsible for dispensing justice and in this capacity contributed to the establishment of state authority. The bureaucracy also included a fixed diplomatic corps, which became all the more necessary as state formation started taking shape and interstate relations increased.⁷⁹

State formation goes hand in hand with the establishment of permanent armies. In the process, the state acquires a monopoly on instruments of power and the exercise of force. This differed from the medieval position, when the waging of war was, to a large extent, regarded as a private matter.⁸⁰ Although rudimentary signs of conscription already existed, the armies of the time were, by and

⁷⁶ H Spruyt *The sovereign state and its competitors: An analysis of systems change* (1994) provides a detailed description of its dynamics.

⁷⁷ See the first part of this chapter.

⁷⁸ Chabod (n 71 above) 36.

⁷⁹ The growing importance of the diplomat can scarcely be illustrated better than by Machiavelli – the herald of the new statist period – who, among other things, acted as the Florentine representative at the French court. See Skinner (n 15 above) 4 *et seq.*

⁸⁰ By definition the state is the single entity in particular, which has a monopoly of legitimate domestic and external force. H Spruyt (n 76 above) 16 formulates this as follows: 'The state claims a domestic and external monopoly of force. As a

large, manned by mercenaries.⁸¹ The armies were employed by the monarch and consisted of his subjects, as well as foreigners. The armies also often functioned under foreign command.⁸² Nevertheless, it was still possible for a monarch of the sixteenth century to depend on much larger and more efficient armies than their medieval predecessors.

The larger, more active and administratively more efficient state required much more money. Therefore, a drastic breach with the medieval approach to taxation became necessary and a fiscal order had to be established in order to raise much more funds. In terms of the medieval approach it was unacceptable to raise direct taxes. It was argued that the king had to be self-sufficient by living from the products of his crown lands (*royal demesne*), supplemented by loans and indirect taxes.⁸³ The underlying idea was that the king possessed political authority (*dominium*), whilst subjects had a right to private property (*proprietas*).⁸⁴ By raising taxes, the sovereign entered the domain of *proprietas* and contributed to an undervaluation of the distinction between the two domains.

As a result of greater state involvement in the daily lives of the subjects, which was caused by the improved state administration, the traditional attitude against the raising of taxes began to wane. Popular consent for the raising of taxes grew. Previously only the Estates General (in France, Spain, etc.) could sanction the raising of taxes. The situation changed, however, and by the mid-sixteenth century the French kings, Francis I and Henri II, already had the *de facto* power to raise taxes.⁸⁵

The developing territorial states did not have 'national' economies. There was a great amount of domestic economies due to tariff barriers, regularly raised toll fees, a variety of monetary units and an equally great variety of units of weight and measure. State formation had to be and was indeed, accompanied by the transformation of economies into state economies, which later – in particular in the seventeenth century – gave rise to a policy of mercantilism that was followed especially in France, and more particularly under the guidance of the French statesman, Jean Baptiste Colbert (1619-1683). Mercantilism, of which the first signs can be traced back to 1550, was essentially the policy in terms of which all economic resources were mobilised to the advantage of the

consequence non-state actors are stripped of coercive means – mercenaries and privateers thus have disappeared.'

⁸¹ Rice (n 64 above) 98.

⁸² Anderson & Hall (n 72 above) 35.

⁸³ H Heaton *Economic history of Europe* (1948) 70; Berman (n 1 above) 484.

⁸⁴ Rice (n 76 above) 101-102; see also Ritter (n 70 above) 21.

⁸⁵ Rice (n 76 above) 102-103; Koenigsberger & Mosse (n 68 above) 228-231.

reinforcement of state power.⁸⁶ It gave rise to the general introduction of an all-embracing state practice with regard to the raising of taxes and the monetary unit, and the payment of toll and custom fees within the states were gradually phased out.⁸⁷

As the authority of the emerging monarchs of the budding territorial states expanded to the detriment of the feudal units, the various legal systems that had earlier existed also gradually yielded to a single common law, or rather law of the land, which applied in the entire territorial state – initially in England in particular. At the same time, tribunals that had to apply this common law started to make their mark: in England the Court of Common Pleas and the King's Bench.⁸⁸ The general law of the land was also reflected in general works written on the common law. The *Treatise on the Laws and Customs of the Kingdom of England*, which is ascribed to Glanville, appeared as early as 1187 and Bracton's *Treatise on the Laws and Customs of England* some fifty years later.⁸⁹

By the sixteenth century, England had long been an established geographical unit. France was also quickly moving in the direction of the centralisation of power. Various (French) territories, which had not previously resorted under the authority of the French monarch, came under his control during the fifteenth century. The process was completed during the reign of Francis I (1515-1546), with the effect that for the very first time, all French territories were placed under the full control of the French sovereign.⁹⁰ The French model would eventually be adopted throughout the entire Western Europe, including Scandinavia. After the European colonial expansion, the model of an encompassing sovereign territorial state based on the European example, took root worldwide.

Likewise, international relations also changed fundamentally at the dawn of the modern era. These relationships increasingly became *interstate* relations and were managed according to statist logic (*raison d'état*). The implication of this was that, whereas religion previously constituted the critical factor in international relations, the best interest of the state would henceforth become the critical factor in global relations. Previously the primary field of tension in

⁸⁶ S Viljoen *Economic systems in world history* (1974) 143.

⁸⁷ The policy was also applied in respect of the relationship between the colonial powers and their colonial dominions. In terms of this the economies of the colonies were structured in such a way that it served the economic and political interests of the colonial rulers best. Therefore, the colonies' production and trade were structured in terms of the needs of the colonial powers and not to serve the needs of the colonies and their populations. Viljoen (n 86 above) 170 *et seq.*

⁸⁸ Berman (n 1 above) 425-443.

⁸⁹ Berman (n 1 above) 457-9.

⁹⁰ Van Wyk & Spiess (n 32 above) 249.

global politics was that between the Western European Christian Empire and the (so-called godless) world of Islam. Henceforth the fields of tension would exist between the emerging territorial states.

Charles V, king of the Hapsburg territories (which included Spain, the Netherlands, Austria, Naples, Sicily and the Spanish overseas territories) and emperor of the Holy Roman Empire (1519-1556),⁹¹ was still inspired by the ideals of Christian universalism. He still saw his main role as that of the protector of Christianity, the chastiser of

the godless Ottoman Turk⁹² and the extirpator of the wide-spread heresy that followed the Reformation. Like a true medieval ruler, Charles' mentality was driven by a Christian universalism. He represented the bygone era. Francis I, king of France (reigned: 1515-1546), was the very antithesis of Charles and stood in stark contrast to him. In the sphere of international political relations, Francis drew a distinction between political efficacy and religious purity. He practised *Realpolitik* par excellence and, despite religious considerations, placed the interests of the French state first. In the European context, the two rulers were opponents. In his war against Charles, Francis rejected religious logic by concluding what was seen from a medieval perspective as an *unholy* alliance in 1525 with the (ungodly Islamic) sultan against his (Francis') Christian (Habsburg) brother.⁹³ When Charles died, the ideal of Christian universalism was already a thing of the past.

Although the ideal of Christian universalism had vanished from the international scene, religion as a political determinant, however, firmly remained within the emerging territorial states. Statist logic caught on with difficulty and religion remained a determining political factor for a considerable time. Within the states there was little tolerance for religious pluralism and therefore also for a variety of religious denominations existing simultaneously in a single state. A fundamental change would only set in after the terror of the French religious wars, which will be dealt with later.

4 Reformation

Martin Luther did not plan a political revolution, nor did he wish to cause a schism in the church.⁹⁴ He was a very reluctant *revolutionary* who was loath to abandon any tradition, unless he could justify it from

⁹¹ Rice (n 64 above) 107.

⁹² Rice (n 64 above) 108; Koenigsberger & Mosse (n 68 above) 178.

⁹³ Rice (n 64 above) 120.

⁹⁴ Elton (n 12 above) 13.

Scripture.⁹⁵ Even when the Reformation and the schism caused by it were already a *fait accompli*, he still refused to regard the schism as final and placed his hopes on the internal reformation of the one universal church.⁹⁶ Insofar as Luther did indeed plan something, it was aimed at accomplishing reformation within the church. In this context, however, Michael Oakeshott, amongst others, offers the instructive explanation that human history never follows human design, but develops on the basis of human conduct.⁹⁷ Neville Figgis explains that, although Luther had his gaze fixed on the heavens, it was his function – along with Zwingli and the Anglicans, Wyclife and Hooker – to transfer all the most important elements of power that had settled in the church during the Middle Ages, to the state.⁹⁸ Figgis formulates this as follows:

... the medieval mind conceived of its universal Church-State, with power ultimately fixed in the Spiritual head bounded by no territorial frontier; the Protestant mind places all ecclesiastical authority below the jurisdiction and subject to the control of the 'Godly prince.'⁹⁹

Elsewhere – probably rather exaggerated, but not entirely off the mark – Figgis summarises the argument that the Protestant revolution had been the necessary condition for royal absolutism, as follows:

Had there been no Luther there could never have been a Louis XIV.¹⁰⁰

From a political perspective, the Protestant *Reformation* should rather be characterised as a revolution. The medieval universalism of the ecclesiastic-imperial unity – in Luther's time already an eroded concept – was abrogated with the Protestant revolution. The revolution was twofold: Firstly, it had a secular aspect, which entailed that the church was relieved in totality from its temporal authority, which would henceforth be reserved for (temporal) politicians. Through the Lutheran revolution the church became a mere association within the state. It no longer existed as an independent entity alongside the state, nor was it elevated above the state.¹⁰¹ Secondly, it reflected an aspect of particularism. This means that where political authority had previously vested, at least in part or sometimes dominantly, in the emperor of the universal empire instead of in the princes of the smaller political units, it had now

⁹⁵ Elton (n 12 above) 17.

⁹⁶ Elton (n 12 above) 54.

⁹⁷ M Oakeshott *Rationalism in politics and other essays* (1962) 1-36.

⁹⁸ Figgis (n 26 above) 71.

⁹⁹ Figgis (n 26 above) 71.

¹⁰⁰ Figgis (n 26 above) 81. (Louis XIV of France is generally regarded as the personification of absolutism.)

¹⁰¹ Berman (n 1 above) 269.

definitely shifted to the monarchs of several budding territorial states.

The success of Luther's revolution could be ascribed to the fact that the time was ripe for the emergence of a figure of his nature, to fulfil his role. As explained above, the intellectual climate of the Renaissance was very inimical towards the continuance of the authority of the church. The intelligentsia of the time slowly became aware of their national (or statist) identity. They found it increasingly difficult to associate themselves in an unqualified fashion with membership of a single Christian society.¹⁰² The challenge presented to the church by Luther reflected the changed condition in which the contemporary society already found itself. The Lutheran revolution also formed a natural alliance with a considerable number of German principalities and free cities, which found support for their political aspirations to greater autonomy in that revolution and who had adopted Lutheranism as their state religion.¹⁰³

Latin, the holy language of the *Republica Christiana*¹⁰⁴ and one of the cornerstones of the medieval identity, began losing ground against the new emerging written languages of Western Europe.¹⁰⁵ The new written languages were stimulated in particular by the invention of the printing press, in the mid-fifteenth century. The market for Latin books was exhausted, because only a fraction of the population could read Latin. Consequently, the book market was soon stocked with large quantities of German, French and English works, which were accessible to many more people.¹⁰⁶ Benedict Anderson explains this as follows:

... the evolution of these vernaculars to the status of languages of power, where, in one sense, they were competitors with Latin ... made its own contribution to the decline of the imagined community of Christendom.¹⁰⁷

The elevation of mother tongues to the status of written languages and languages of learning, contributed to the disintegration of the overarching medieval Christian identity and to the enhanced realisation of new identities. By utilising the printed word, the Lutheran revolution could, in contrast to earlier deviations from ecclesiastic orthodoxy, gain an advantage on the Roman Catholic Church. Luther's German writings were distributed so quickly – he is

¹⁰² Van Wyk & Spies (n 32 above) 287.

¹⁰³ SJ Lee *Aspects of European history 1494-1789* (1982) 18-25; Ebenstein (n 16 above) 304-5.

¹⁰⁴ B Anderson *Imagined communities: Reflections on the origins and spread of nationalism* (1983) 22.

¹⁰⁵ Anderson (n 104 above) 25, 45.

¹⁰⁶ Anderson (n 104 above) 42-43.

¹⁰⁷ Anderson (n 104 above) 43-44.

regarded as the first author of bestsellers¹⁰⁸ – that the church's reactionary efforts to contain it simply proved to be too weak.

Conditions within the church also called for a revolution. Although the schism in the church (1378-1417) with its two and later three popes competing for power was later restored, it caused the moral and spiritual leadership of the church permanent harm.¹⁰⁹ The Renaissance papacy subsequently became closely involved in capricious Italian urban politics. The church became a political and military role player alongside other role players of the same kind. The popes also came from the ranks of the prominent dynastic Italian families of the time.¹¹⁰ The conduct of the popes in the period directly preceding Luther's appearance on the scene was also characterised by moral decay, nepotism and a hunger for power, which caused immeasurable harm to the prestige of the church.¹¹¹

Martin Luther's theology, which also contained his implicit political theory, had far-reaching political implications. According to Luther's doctrine, salvation could only be achieved through faith – *sola fide* – and by the grace of God. This theology of *solifidianism* had calamitous implications for the church, for if the path to salvation lies in faith and God's grace alone, there is no place whatsoever for the orthodox ecclesiastical doctrine that the church has to act as a mediator between the individual believer and God.¹¹² The true church is therefore the *congregation fidelium* – the invisible community of a congregation or congregations of the faithful who gather in the name of God, and not the visible ecclesiastical hierarchy. This did not only render the ecclesiastic order of the world (most prominently represented in the Roman Catholic Church) irrelevant for purposes of salvation, but also subjected the church authorities to a position of equality, for everybody has an equal capacity for faith and together all Christians formed a true Christian class. Therefore, there was no longer any place for a separate and elevated priesthood class, which had for long formed the top layer of the social order.¹¹³

All ecclesiastic institutions, including the priesthood and monasticism, which had been based on the assumption that the clergy was a separate elevated class with special powers and privileges, thus found themselves fully immersed in the turmoil of Luther's

¹⁰⁸ Anderson (n 104 above) 43.

¹⁰⁹ Van Wyk & Spies (n 32 above) 291.

¹¹⁰ Van Wyk & Spies (n 32 above) 293-4.

¹¹¹ Van Wyk & Spies (n 32 above) 294; Smith (n 13 above) 25-26.

¹¹² Skinner (n 15 above) Vol II 10-11; Rice (n 64 above) 127-128: One could attain salvation only through faith, the Scriptures and by the Grace of God – *sola fide*, *sola Scriptura*, *sola gratia*.

¹¹³ Skinner (n 15 above) 11.

onslaught.¹¹⁴ Luther was also of the opinion that the existence of a separate system of canon law was no longer justified.¹¹⁵ The law is statist law – law promulgated and enforced by the state. Against this background one can declare with a great measure of conviction that Luther's revolution had, similar to the way in which it had previously opened the door to the later emerging statist absolutism, provided fertile land for the seeds of a new legal theory – a positivist legal theory that regarded the law as neutral and as a means to achieve an end, instead of an end in itself; in particular, a legal theory in terms of which the law is regarded as an instrument to further and enforce the sovereign's policies.¹¹⁶

According to Luther there was also no place for the ideal of monastic life – one of the authentic manifestations of the assumption that the clergy formed a class of its own.¹¹⁷ Monasticism not only restricted evangelic freedom, but also flew in the face of *solfidianism*, for instead of accepting that faith alone paved the way to salvation, it overemphasised the importance of good works.¹¹⁸

In view of the fact that the church, as an invisible community of the faithful, should not have a hierarchical order or pyramid structure, the church had no further political role to play at all. Politics were reserved as the exclusive domain of the state. This fact underlies the truism that the Reformation was an aspect of the emergence of the state.¹¹⁹ It is the task of the church to spread the Gospel. Conversely, God ordained the domain of temporal authority. Accordingly, political authority is exercised by temporal rulers in order to preserve peace among sinful people.¹²⁰ As a result, papal and ecclesiastic claims to temporal power constituted a usurpation of power in the domain of temporal leaders.

In Luther's opinion, the political power vacuum that was caused by his doctrine against ecclesiastic claims to political authority should be filled by (temporal) politicians. If the church, according to the Lutheran doctrine, was merely a community of the faithful, this means that the secular officials had a monopoly over political authority, which, in addition, included political authority over the church.¹²¹ In view of the fact that the church operates exclusively on a spiritual level, this (temporal) political authority of the state in no way encroaches upon the domain of the church. Yet it is still implied

¹¹⁴ Skinner (n 15 above) 13.

¹¹⁵ Skinner (n 15 above) 13.

¹¹⁶ Berman (n 1 above) 29.

¹¹⁷ Skinner (n 15 above) 13.

¹¹⁸ Skinner (n 15 above) 14.

¹¹⁹ Ebensten (n 16 above) 303; Rice (n 64) 167.

¹²⁰ Skinner (n 15 above) 14.

¹²¹ Skinner (n 15 above) 15.

that the visible church — the ecclesiastic structures — are placed under temporal political authority. Luther explained that there is no place for the church in the temporal and therefore, the political domain. This destroyed the notion of the pope and the emperor as parallel universal potentates.¹²²

The implication of Luther's doctrine was that the political domain was liberated from religious regulation and became a completely secular matter. The political implications of Luther's work, however, reached much further, for where political authority in the old medieval order resided in the emperor, who exercised universal authority over the Holy Roman Empire, it was henceforth assigned to the various new emerging territorial states. Neville Figgis crisply summarises the two aspects of the fundamental change brought about by the Reformation as follows:

The change is a change from a world-empire to a territorial State, and from ecclesiastical to civil predominance.¹²³

Luther expressly rejected the idea of insurrection against political authority — at that stage the authority of the territorial states (in Germany, the authority of the principalities). A Christian believer's proper orientation should, according to him, be one of passive obedience.¹²⁴ The sovereign, whose authority has been ordained by God and who derives his authority directly from God, must be obeyed. He did, however, concede that a political ruler does not have boundless powers and that the obligation to obey the ruler did not stretch as far as obeying ungodliness on the ruler's part. However, any reaction against the political ruler could never include active resistance against such ruler.¹²⁵ This *political* argument of Luther's was a direct result of his *theological* conviction that the current social and political order reflected God's will and providence. Those opposing this order are therefore insurrectionists against God.¹²⁶ This approach deviated from the medieval approach according to which the people were always entitled to resistance and could even lawfully depose the sovereign when the latter acted in contravention of his governance contract with the people and established custom.¹²⁷

This also clearly reflects the close connection between Luther's theology and the divine right of kings.¹²⁸ In fact, Luther lay the most

¹²² Skinner (n 15 above) 15.

¹²³ Figgis (n 26 above) 72.

¹²⁴ Figgis (n 26 above) 74.

¹²⁵ Skinner (n 15 above) 16-17.

¹²⁶ Skinner (n 15 above) 18-19.

¹²⁷ In respect of the medieval view, compare Carlyle (n 15 above) Vol III 21, 39-40, 58, 59, 113, 130, 168; Vol V 112; Vol VI 396, 410; Ullmann (n 36 above) 147.

¹²⁸ Figgis (n 26 above) 77-93.

unqualified theological foundation for this absolute royal right to govern. After the divine right of kings enjoyed no substantial support during the Middle Ages and was hardly mentioned during that period,¹²⁹ it forcefully entered the stage with the Reformation, in particular as a result of Luther's doctrine.

The separation of politics and religion and the concomitant recognition of two independent entities – a religious and a state identity – the first signs of which can already be traced to the works of Dante, Marsilius, Wyclife and Huss, gave rise to the development of practical politics in Luther's time. After Luther, the territorial state was not only supported by the humanism of the Renaissance and the absolutistic trends in Roman law, but also – although unintentional, this was absolutely crucial – by a sympathetic theology.

The Reformation is an endorsement of the claim to participate in all branches of human activity independently and detached from the church. The Reformation further promoted the growing importance of the divine right of kings,¹³⁰ which confirmed that politics stood independent of the church and which could in fact be regarded as the political aspect of the Reformation.¹³¹ This theory placed political power firmly in the hands of the monarch and denied the church any vestige of such power. The theory of the divine right of kings was very appealing, because it fit the intellectual climate of the times well: although the divine right of kings had the effect of furthering temporal political power, it was formulated in theological terms. From a rhetorical angle, it was the most convincing and effective theory at the time. The pope was, as it were, challenged and conquered in his own domain.

The only way to escape from the fetters imposed by traditional methods, was to assert from the old standpoint of a scriptural basis and to argue by accustomed fashion of Biblical quotations, that politics must be free from theology and that the Church must give up all attempts to control the State.¹³²

A nontheological mode of politics was thus established by theological sanction.¹³³ The divine right of kings, however, was not permanent. It was a real transitional theory, spanning the period between medieval and modern mentalities. Its *aim* and *purport* was the modern secular state, but its *rhetoric* and *logic* was of a medieval theological nature. It maintained that politics – the autonomous state

¹²⁹ Carlyle Figgis (n 26 above) Vol VI 185-7.

¹³⁰ JN Figgis *The theory of the divine right of kings* (1896) 257.

¹³¹ Figgis (n 130 above) 260.

¹³² Figgis (n 130 above) 258-9.

¹³³ Figgis (n 130 above) 259.

— have a legitimate function, but that such autonomy is represented as part of God's decree for humankind.¹³⁴ State (and sovereign) autonomy could only be claimed efficiently if it were regarded as a divine right. In terms of the divine right of kings, secular authority has thus been ordained by God.¹³⁵

5 Impasse

Religion — Christianity — was the most important factor in the medieval imperial ecclesiastic global unity. Christianity stood in opposition to Islam, which remained beyond the realm of Christianity, while within the Christian world, it was heresy that stood in opposition to (genuine) Christianity. Heresy refers to false doctrines and deviations adhered to by small groups of apostates. Due to the insignificant numbers of followers of the heretical movements, heresy was easily contained for a considerable period of time. As explained in chapter 2, heresy in the imperial-ecclesiastic totality was experienced as an insurrection against both the church (and God) and the (Christian) empire. Not only was it a false religion, but at the same time it also constituted subversive politics.

The Reformation shattered the homogeneous medieval *universum*. Therefore, if religion would have continued to be treated as a public matter — as in the Middle Ages — and not as private matter, it would undoubtedly have caused wide-spread conflict.

Even after the Reformation religion was in fact still treated as a political matter, which did indeed lead to intense and bloody conflict. The era following the establishment of Protestantism is in fact referred to as the period of religious wars.¹³⁶

Opponents on both sides of the politico-religious divide treated religion, in typical medieval fashion, as a political question. The reluctance of politico-religious antagonists in the post-Reformation period to regard religion in a modern way as a nonpolitical and private matter, clearly emerged during the sittings of the Imperial Diets on 18 and 19 April 1521 at Worms, when a dramatic confrontation occurred between Luther and the new young emperor of the Holy Roman Empire (and head of the Habsburg dynasty), Charles V. Luther bluntly refused to retract any of his Protestant statements. In turn, Charles reacted implacably and undertook to venture everything, including

¹³⁴ Figgis (n 130 above) 256.

¹³⁵ Figgis (n 130 above) 257.

¹³⁶ See for example in general RS Dunn *The age of religious wars 1559-1689* (1970).

his own person, to oppose Luther's *heresy* and to advance *true* Christianity.¹³⁷ Inspired by an unwavering faith in the veracity of Roman Catholic doctrine and their rejection of the godless Protestant heresy, Charles V and his successors, including Philip II and Ferdinand II, would wage a struggle as Crusaders for Catholicism against Protestantism in the times that followed.

The religious wars affected the entire Western and Central Europe. The first wars occurred in Germany and in the Swiss cantons.¹³⁸ These were followed by a succession of wars: the war of the Dutch people, partly religion-inspired, against the Spanish Catholic Hapsburgs, the civil wars in France, Scotland and Ireland and of course, the Thirty Years' War (1618-1648),¹³⁹ waged mainly in the German territories, which was in effect a general European war due to Hapsburg, Danish, Swedish and French participation.

Admittedly, religion was not the only reason for the religious wars. The religious motive often accompanied other causes of war. However, religion was the common denominator that constantly presented itself.¹⁴⁰ The Dutch revolution against Spain was not only religious in nature, but also inspired by national sentiment.¹⁴¹

In England, where constitutional conflicts raged for the major part of the entire seventeenth century, religion was also a permanent cause of war, amongst several other causes. Successive English kings caused feelings to run high with their efforts to reclaim England for Roman Catholicism. James I, who reigned in the early seventeenth century, strove to attain religious uniformity,¹⁴² while James II (reigned: 1685-1688) endeavoured to return England to the Catholic fold.¹⁴³ In the process, he alienated himself from the English people and his ultimate dethronement was a direct consequence of his Catholic-inspired conduct.¹⁴⁴

The Thirty Years' War (1618-1648), which was in fact no less than five different wars,¹⁴⁵ was also waged for religious reasons to a

¹³⁷ Rice (n 64 above) 160-161.

¹³⁸ P de Klerk *et al* *Die opkoms van Europa* (1977) 136; W Wallback *et al* *Civilization past and present* Vol VI (1981) 263.

¹³⁹ De Klerk (n 138 above) 136.

¹⁴⁰ Dunn (n 136 above) ix.

¹⁴¹ Dunn (n 136 above) 32-33.

¹⁴² De Klerk (n 138 above) 193.

¹⁴³ Dunn (n 136 above) 169.

¹⁴⁴ Paragraph 2 of the first article of the Bill of Rights, adopted in 1689 as a result of the dethronement of James II, clearly reflects the revolt against King James' repulsive religion-inspired conduct: 'Whereas the late King James II by assistance of diverse evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom - ...'.

¹⁴⁵ SL Lee *Aspects of European history 1494-1789* (1978) 106.

greater or lesser extent. At least emperor Ferdinand II regarded the advancement of Catholicism as the main object of war. He clearly demonstrated this by issuing the Decree of Restitution in 1629, in terms of which he banned Calvinism from the Holy Roman Empire, reattached all properties of the Roman Catholic Church that had been confiscated after 1552 and restored the authority of Rome's ecclesiastic control over a large number of territories.¹⁴⁶

Although the eight French religious wars, which raged periodically from 1562 to 1598,¹⁴⁷ were inspired by more than religion, the single most important matter at stake for both opposing parties in these successive wars, was the religious character of the French state. The politico-religious works of that period prove this.¹⁴⁸ Furthermore, the pope undeniably demonstrated the religious nature of the conflict when he approved¹⁴⁹ the mass murder of French Protestants during St. Bartholomew's Eve on 24 August 1572.

The first effort to resolve the immense disorder caused by the religious schism, occurred in the Holy Roman Empire when the Peace Treaty of Augsburg was concluded in 1555. The Augsburg peace accord was partly medieval and partly modern in form. It accepted the religious schism as a *fait accompli* and did not seek to restore the medieval universal homogeneity. It did, however, retain the basic medieval principle of treating religion as a political factor and dividing line, for instead of treating religious denomination as a matter of individual choice, the Augsburg accord followed the principle of *cuius region eius religio* — he who governs a specific territory determines the religious nature of such territory.¹⁵⁰ The peace accord therefore vested the ruler with a *ius reformandi* in terms of which he could decide on the religious character of his realm. Religion therefore remained a political affair, as mentioned. The political order still retained its public political character, similar to the medieval dispensation. Religion was still not relegated to the

¹⁴⁶ Dunn (n 136 above) 73. On the most extreme edge of the opposition there was Richelieu, who became involved in the war simply for reasons of Realpolitik, namely to serve French interests, and supported the Lutheran Gustav Adolph of Sweden against his Hapsburg political opponents (notwithstanding his close Catholic association with the Hapsburgs (Dunn (n 136 above) 74). The Bohemian uprising that started the war, was inspired by a mixture of Bohemian national and religious motives (De Klerk (n 138 above) 208). The Danish involvement can be blamed on a mixture of Danish dynastic and Protestant-religion inspired motives (Dunn (n 136 above) 72; De Klerk (n 138 above) 210). The same applies in respect of Swedish involvement (Dunn (n 136 above) 73; De Klerk (n 138 above) 213). See furthermore on the prominence of religious motives during the Thirty Years' War TK Rabb *The Thirty Years' War* (1972) 53-57.

¹⁴⁷ De Klerk (n 138 above) 176-180; Dunn (n 136 above) 20-29.

¹⁴⁸ JW Allen *A history of political thought in the sixteenth century* (1960) 280-366.

¹⁴⁹ De Klerk (n 138 above) 1977-178; Ebenstein (n 16 above) 306.

¹⁵⁰ Rice (n 64 above) 165, Dunn (n 136 above) 49 and Smith (n 13 above) 107 explain that the principle was not broadly applied, nor applicable to all German territories and that only Catholic sovereigns were subject to it.

private domain. In contrast to the medieval position – and in this respect Augsburg heralded a different dispensation – political units could henceforth display varying natures, depending on the decision of the ruler in question. Thus the religious character of the various political units became a function of princely sovereignty.

As religion still remained within the public sphere, the choice of religion was not elevated to an individual right. The only individual right created by this peace accord was the *ius emigrandi* – the right of individual citizens to emigrate to a territory where the sovereign

adhered to the same religious denomination as the immigrant.¹⁵¹ This arrangement could therefore not be regarded as favouring individual religious tolerance, but rather interstate religious tolerance.¹⁵² Individuals lacked the freedom to exercise their religion of choice within a state. The power of individual political rulers to determine the religious character of their individual principalities was, however, recognised.

It was demonstrated *inter alia* by the Thirty Years' War, that the Treaty of Augsburg could not stand the test of time and that this peace accord did not take the full implications of the schism of Western Christianity into account. Due to its political fragmentation, Germany was susceptible to the peace accord of Augsburg. A variety of choices on the religious character of their principalities could be made by the individual rulers and their subjects could, if necessary, exercise their *ius emigrandi* and depart to another principality, if their religious convictions differed from those of their prince.

France, however, was not susceptible to a compromise of the nature of Augsburg. It was France that was exposed to the full turmoil of the religious schism. As further explained below, it was France that created the modern statist formula for handling religious conflict after 1598. George H Sabine sketches France's unique position (in contrast to that of Germany, in particular) as follows:

In Germany divisions of territory made it a struggle between princes, with the result that the fundamental issue of religious freedom need not be pressed. In the Netherlands it took the form of a revolt against a foreign master. In England, as also in Spain, the supremacy of royal power prevented the outbreak of civil war during the sixteenth century. But in France and Scotland a factional struggle arose which threatened the stability of the nations.¹⁵³

¹⁵¹ Rice (n 64 above) 165.

¹⁵² Figgis (n 26 above) 130.

¹⁵³ GH Sabine *A History of Political Theory* (1971) 372.

The French state had already been a single territorial unit for a long time. The religious character of the French state, however, was contentious and uncertain. From 1562 to 1598 a succession of religious wars constituted the bloody method applied to remove this controversy. The legal and political philosophy of this French era – one of the most important chapters in the history of French public philosophy – was of singular importance.¹⁵⁴

The most striking characteristic of the political thought inspired by both the Roman Catholic and the Protestant parties was its conservatism. It failed to seek a *modus vivendi* to accommodate the existence of diverging religious convictions and desperately clung to the medieval ideal of a universal religious homogeneity that left no space for religious tolerance.¹⁵⁵

The Huguenot (Calvinistic) Party in France adapted to their minority status and did not strive to win the first prize in achieving a totalitarian Calvinistic state, on the model of Calvin's state in Geneva.¹⁵⁶ The Huguenot Party's political theory was an eclectic concoction of mostly unconvincing claims to popular sovereignty,¹⁵⁷ on the basis of the antique constitution of the Middle Ages.¹⁵⁸ It was permeated by Calvin's aristocratic conviction that an insurrection against the king can only be lawful if it takes place under the command of public officials or similar important personages in society (*magistrati*).¹⁵⁹ For present purposes, however, this topic is unimportant.

The essence of the Huguenot Party's school of thought was their conviction that the king did not exercise unlimited authority and that the people therefore did not owe the king absolute allegiance. Should the king act to the people's detriment, such conduct would constitute a breach of his covenant with God and he would thereby forfeit the people's obedience. The most heinous wrong that the ruler could do, would occur when he acted contrary to the true faith – which, in the Huguenots' opinion, was Calvinism. In such instance the king

¹⁵⁴ Sabine (n 153 above) 372.

¹⁵⁵ Dunn (n 136 above) 4.

¹⁵⁶ Allen (n 145 above) 304.

¹⁵⁷ Allen (n 148 above) 305; 309-310. It appears *inter alia* in the works of Hotman. For the Huguenots, popular sovereignty had only a passive meaning, namely that the sovereign should govern to the advantage of the population. However, this concept of popular sovereignty did not enable the people to rebel of their own volition. Magistrates – members of the governing class – always had to lead the revolt, in the absence of which the people had no other option but to accept the unjust government's authority. See further on this topic Allen (n 148 above) 325.

¹⁵⁸ See chapter 2.2.

¹⁵⁹ Allen (n 148 above) 322-325.

transformed into a tyrant, which would justify a lawful revolt against him.¹⁶⁰

The Catholic League was equally convinced of the truth of their philosophy and argued along the same lines. However, as the Catholics constituted by far the greater part of the French population, they maintained that the French state should have an unqualified Roman Catholic character. They argued that the king had no authority to enter into compromises with the Huguenots, whom they regarded as heretics.¹⁶¹ In typical medieval fashion, the argument was raised that heresy was the root of all evil and that it caused the French people particular suffering. Heresy was not only regarded as a religious deviation, but also as subversive politics. It was maintained that heresy against the church always foreboded rebellion against the king.¹⁶² In this respect and in the light of the political conditions in France at the time, the Catholics were indeed correct, for it was one of the essential principles of the Huguenot doctrine that revolt against and the overthrow of a ruler, who persecutes believers of the true faith, is lawful.

One of the most important objects of the Catholic League was the need to achieve religious homogeneity of the state (on the model of the imperial-ecclesiastic global unity of the Middle Ages). The Catholic League argued that religious homogeneity was the only true foundation of the French state and that it is impossible for any state to exist without such unity. In their opinion, the cohesion of a statist community originates in religion and therefore the ruler's primary duty lies in eradicating heresy, which is a threat to such cohesion.¹⁶³ The Catholic League argued that the king could be lawfully deposed if his conduct was harmful to the state – and the worst harm the state could suffer, occurs when the king allows more than one faith to be practised in it.¹⁶⁴

It was further argued that, since religious unity formed the cornerstone of a solid statist community, each and every Frenchman necessarily had to be a Catholic. Jean Boucher, one of the most eminent spokesmen of the Catholic League, therefore declared that no Huguenot could be a Frenchman, just as no Turk could be a Frenchman.¹⁶⁵

The conflict between Catholic and Huguenot in France symbolised the impasse that the religious schism brought about in Europe. The

¹⁶⁰ Allen (n 148 above) 306, 314-318, 327.

¹⁶¹ Allen (n 148 above) 344.

¹⁶² Allen (n 148 above) 347.

¹⁶³ Allen (n 148 above) 347.

¹⁶⁴ Allen (n 148 above) 348.

¹⁶⁵ Allen (n 148 above) 352.

continued treatment of religion as a political issue — the identification of religion with politics — in a well-established territorial state obviated any peace, order and stability and furthermore merely guaranteed an emaciating conflict, as had been demonstrated so vividly by the bloody religious wars. The functioning of religion as a political category — which had been the foundation of the medieval imperial-ecclesiastical unity — caused Europe to find itself in a political impasse. The Christian unity of bygone days had yielded to irreversible fragmentation. The craving for the politics of truth — in other words, the establishment of states on a uniform religious basis — could no longer be reconciled with order and stability. The only way to break the impasse was to opt for order, instead of religious verity, and a concomitant relegation of religion from the public domain, as a political issue, to the private sphere where individuals could decide on it as a personal matter.

CHAPTER 4

THE FOUNDING AND FOUNDERS OF STATISM

1 The *Politiques*, Michel de l'Hôpital and Jean Bodin

The *Politiques*, a religious neutral political grouping that came into being amid the bloodshed and chaos of the French religious wars, led the way out of the impasse of the religious wars. Although the *Politiques* and its most important protagonists, Michel de l'Hôpital and Jean Bodin, were Catholics, they were not prepared to subject the interests of the French state to the Roman Catholic Church. The *Politiques* regarded a person's citizenship, and not his membership of some or other religious denomination, as the only relevant political criterion. Where both the Catholic League and the Huguenot Party gave priority to religious veracity in order to clothe the state with a specific religious character and were even willing to enter into civil war to achieve such aim, l'Hôpital on the other hand, rejected religion as a decisive factor in politics. From a political point of view, he regarded 'Lutheran', 'papal' or 'Calvinist' as repulsive concepts. A person's citizenship does not lapse when he is excommunicated.¹ A specific religious character is therefore not an indispensable prerequisite for the existence and stability of a state.

Although he conceded that religious harmony is beneficial to the state and that the sovereign should endeavour to promote religious harmony to the state's advantage,² he was of the opinion that such harmony is not an essential condition for the existence of the state. If a new religion has already been well established, it must be tolerated. The existence of the state on the one hand, and of religious pluralism on the other, is therefore not mutually exclusive. This deviated from the medieval view that the state had to be a *Christian* republic.

¹ W Ebenstein *Great political thinkers: Plato to present* (1969) 350.

² JW Allen *A history of political thought in the sixteenth century* (1960) 349.

Both L'Hôpital and Bodin were intensely involved in French politics of their times.³ They did not go about their task as detached theorists, but with the real aim of trying to save the divided French state.⁴ Jean Bodin's work therefore displays neither theoretical purity, nor consistency. One can only understand his political theory against the background of the object he tried to achieve, namely to establish lasting public order and peace.⁵

L'Hôpital is regarded as the founding father of the *Politiques* movement.⁶ In contrast to his opponents, who were religious extremists to whom religious truth was of primary importance, he regarded internal peace and stability as the highest virtue. Therefore religious factions had to be nipped in the bud, for otherwise it could lead to civil war. To his mind, it was not the king's duty to punish heretics, just like government was not obliged to uphold the *true* faith. Justice did not demand that people, who act in good faith in accordance with their religious beliefs, without harming others, should be prosecuted for accepting a specific religious belief. Although it may possibly not always be wrong to criminalise religious convictions, such criminalisation and resultant prosecution do not constitute the primary duty of government. Government's primary task is indeed to preserve peace and order. Government should be committed to achieve just that and nothing more. Government should rise above any religious discord and never take sides for any religious grouping.⁷

L'Hôpital was not indifferent towards the political role that religion performed. He regarded the existence of two religious denominations in a single state as a dangerous evil, for nothing divides people as intensely as religion. According to him, France would have been much better off if it had only one religion,⁸ but with things being the way they were in France at the time, it was clear that the only way that peace could be maintained, was through the granting of religious freedom. The relevant question was not about what the *true* faith was, but how people could coexist in peace.⁹ Prosecution as a means of preserving religious uniformity had failed. The price that would be paid for continuing prosecutions was the potential

³ See for example Allen (n 2 above) 292, as well as O Ulph 'Jean Bodin and the Estates-General of 1576' (1947) XIX *The Journal of Modern History* 289.

⁴ JU Lewis 'Jean Bodin's logic of sovereignty' (1968) 16 *Political Studies* 210.

⁵ Lewis (n 4 above) 213. Together with those of Machiavelli and Hobbes, Bodin's political theory is aptly described as the ideology of order. See for example P King *The Ideology of Order: A comparative analysis of Jean Bodin and Thomas Hobbes* (1974).

⁶ Allen (n 2 above) 292.

⁷ Allen (n 2 above) 293-295.

⁸ Allen (n 2 above) 295.

⁹ Allen (n 2 above) 295.

destruction of the state. L'Hôpital regarded that price as too high. Under the circumstances, religious tolerance was the only recourse.¹⁰

L'Hôpital did not view tolerance as a matter of theoretical principle. Where some of his contemporaries and protoliberal theorists of the seventeenth century, pleaded for the recognition of religious tolerance as a matter of *principle*,¹¹ for him the primary issue was not one of religious freedom, but of the interests of the state. It was thus a case of religious freedom for the sake of a genuinely secular consideration, namely the survival and stability of the (French) state.

Bodin's views on tolerance correspond for the most part with those of L'Hôpital. The main emphasis of Bodin's doctrine, however, was placed on state sovereignty. He regarded sovereignty as the distinguishing characteristic of the state; such sovereignty had to be exercised for the sake of preserving the state. Should the preservation of the state require that a certain degree of religious freedom be allowed, sovereign power may be applied for that purpose.

Bodin found himself in the opening phase of the long history of political philosophy in the early stages of our modern era. He laid the foundations of modern statist political theory.¹² However, if one considers the type of restrictions that Bodin placed on sovereign it is clear that he still had one leg planted in medieval legal tradition.

Bodin viewed sovereignty that resides in state government — the sovereign — to be the highest authority resorting under God. Sovereignty is the key to combating and controlling centrifugal forces that threaten to destroy the continued existence of the state. Sovereignty is the fundamental precondition for the existence of the state.¹³ All other state institutions owe their existence to the grace of the king.¹⁴ Bodin regarded it as crucially important that state authority must be centralised, in order to assure that a law of general application can

¹⁰ Allen (n 2 above) 296.

¹¹ For example, humanist sceptics like Castellio, Acontius, William Walwyn and Francis Osborne, who argued that the truth or falsehood of certain things was in any event not objectively determinable and that it would be inappropriate and cruel to prosecute someone on account of it. See for example B Tierney 'Religious rights: an historical perspective' in J Witte & JD van der Vyver (eds) *Religious rights in global perspective* (1977) 18 *et seq.*

¹² MA Sheppard (1930) 45 'Sovereignty at the crossroads' *Political Science Quarterly* 591-596; Allen (n 2 above) 416-423; M Wolfe 'Jean Bodin on Taxes' (1968) 83 *Political Science Quarterly* 268; Lewis (n 4 above) 215-218. To a certain extent, Machiavelli's claim to be called its founder is more justifiable. However, Machiavelli was premature, for as a Florentine he was not confronted by the problems inherent in the large territorial state, but by the difficulties of the city state of Florence. Furthermore, unlike Bodin he was not confronted by the schism of Western European Christendom.

¹³ King (n 5 above) 75.

¹⁴ King (n 5 above) 98.

be enacted for the entire state. The king should be at liberty to enact laws of general application for the state, removed from any conflicting claims of sectional (territorial and religious) entities.

Bodin's modernism clearly emerges in this context, as there is no mention that government, like in the Middle Ages, should merely passively find the law that binds its subjects. On the contrary, government must actively create law. Government is therefore an active creator of law – the issuer of commands. Here one can clearly detect the early signs of later schools of thought of Hobbes and John Austin, prominent exponents of the sovereign territorial state.¹⁵

Bodin differed from Hobbes, however, in two important respects. Bodin's sovereign was not as mighty as that of Hobbes. He still remained subject to a number of restrictions imposed by divine and natural law.¹⁶ The most important effect of the restrictions on the sovereign's actions, was the sovereign's preclusion from infringing on certain of the citizenry's civil interests.¹⁷ Government may not force its citizens to enter into contracts, may not confiscate property arbitrarily and may only tax the citizenry within reasonable bounds. There would, however, appear to be a contradiction in this respect, for how can Bodin, on the one hand, emphasise sovereignty, which effectively implies an unrestricted authoritative capacity, while at the same time debilitating it with the restrictions just mentioned?

The answer to this lies in the fact that Bodin still argued in a typically medieval fashion, because the nature of the restrictions in terms of which he qualifies sovereignty are indeed the type of restrictions that medieval law had imposed on rulers. In the Middle Ages a prince's power to levy taxes was extremely limited.¹⁸ It took the utmost effort to gain such power and the concomitant right to infringe the right of ownership in a lawful way. The restriction prohibiting an infringement of ownership is also typically medieval, although at first glance it appears to be the product of nineteenth-century liberal capitalism. During the Middle Ages, ownership was much more restricted than in the nineteenth century.¹⁹ It was therefore barely possible to restrict it any further and consequently a conflict would only appear to exist if one evaluated sovereignty from a modern perspective. However, according to Bodin's own medieval-

¹⁵ Lewis (n 4 above) 208 declares that Bodin represented a break with the Middle Ages in the sense that he emphasised legislation instead of custom.

¹⁶ Sheppard (n 12 above) 586-588.

¹⁷ Sheppard (n 12 above) 591-596; Allen (n 2 above) 416-423; Wolfe (n 12 above) 268; Lewis (n 4 above) 215-218.

¹⁸ Discussed further in chapter 3.3.

¹⁹ On the earlier (precapitalist) restricted definition of the right of ownership see AJ van der Walt 'Marginal notes on powerful legends: Critical perspectives on proprietary theory' (1995) 58 *Journal of Contemporary Roman Dutch Law* 396 *et seq.*

inspired way of thought, no contradiction is present. According to medieval convictions, which still partly moulded Bodin's thought, only civil law resorted under the sovereign's authority; in contrast, fundamental (constitutional) law which, among other things, was regarded as the domain of divine and natural law, stood beyond the confines of the prince's sovereignty.²⁰ Furthermore, Bodin did not treat sovereignty as a rationally conceived concept, but as a functional instrument to bring about an orderly and stable state. Sovereignty therefore stretched only as far as was necessary to guarantee peace and public order in the state. According to Bodin, sovereignty did not function as a theory of pure logic, but as a strategy for preserving the state.²¹ The inherent restrictions associated with this view of sovereignty also serve to maintain order and stability in the state.²²

The restrictions that Bodin placed on the levying of taxes can also be explained in the same manner: private property provided the means to sustain families, which are the fundamental building blocks of the state. Excessive taxation is therefore not only detrimental to individual families, but eventually also to the state.²³

In respect of his sovereignty theory, Bodin continued to build on the basis laid by his medieval predecessors.²⁴ When one considers the restrictions Bodin placed on the sovereign, his position as a transitional figure is apparent. Although it is sometimes maintained that there is a direct line from Bodin via Hobbes to John Austin and modern legal positivism,²⁵ there are also enormous differences. Probably the most important is the fact that Bodin was not an analytical lawyer, drawing a clear distinction between law and morality. On the contrary, the product of Bodin's line of reasoning is specifically applied to realise Bodin's and the *Politiques*' moral judgment of value, according to which public peace and order outweigh religious truth.

Bodin also differs markedly from Hobbes in a second respect. In contrast to Hobbes, but in conformity with Classical convictions, Bodin believed that human community is a natural phenomenon. To Bodin a good citizen and a good person are identical.²⁶ As will appear later in this chapter, Hobbes is completely modern and has no belief whatsoever in the naturalness of human community; on the contrary, to him, individuals are incessantly involved in mutual strife.

²⁰ Sheppard (n 12 above) 597-598; Lewis (n 4 above) 216.

²¹ Allen (n 2 above) 422.

²² Lewis (n 4 above) 213.

²³ Wolfe (n 12 above) 274-275.

²⁴ HF Jolowicz *Lectures on Jurisprudence* (1963) 64-68.

²⁵ See the authors referred to by Lewis (n 4 above) 214.

²⁶ Lewis (n 4 above) 211-212.

Bodin's views on the sovereign's qualities and the way religion should be handled in the state are just as pragmatic as his qualified opinion on sovereignty. It also aims to ensure the unity of state and public stability.

His pragmatic approach also explains his altered views on the question of the succession of Henri IV to the French throne. Henri was a Protestant and therefore the Catholic League opposed his elevation to the throne. Bodin argued that Henri qualified as the rightful successor, based purely on his right of succession to the throne. He did not regard membership of a specific religious denomination as politically relevant and a legal prerequisite for succession to the French throne, in which respect his opinion deviated from that of the Catholic League. Still, in 1589 Bodin changed his view and argued that Henri first had to change his religious denomination before he could become king of France — the same view held by the Catholic League.²⁷ Bodin's change of mind, however, was not religious in nature but politically motivated. This appears from the fact that he did not require Henri to become a Catholic on account of loyalty to the true faith, but propagated his change of denomination for the sake of France and for the sake of ending the religious strife that threatened to destroy the French state.²⁸ He still maintained his basic views on religious freedom and he still regarded religious conflict as the worst evil. As a true *Politique* he merely advocated a politically inspired conversion for the sake of the French state.²⁹

Government's actions should also be aimed at promoting the best interests of the state, instead of being motivated by considerations of religious truth. The state authorities should not become embroiled in religious confrontations and should also not try to promote a certain religious conviction. Should it be possible to attain unity by promoting religious common accord, government is under an obligation to do so. According to Bodin, it is also advisable that the authorities should take action against new religious trends and denominations that have not yet firmly taken root.³⁰ The reason for this is not to be found in the falsehood of such religion, but to prevent it from progressing to such an extent that it could harm the unity and stability of the state. Such state action did therefore not take place because religious dogma and convictions of the new religious trends were regarded as relevant, but purely with the object of reinforcing harmony among the state

²⁷ PL Rose 'The *Politique* and the Prophet: Bodin and the Catholic League 1589-1594' (1978) 2 *Historical Journal* 783 *et seq.*

²⁸ Rose (n 27 above) 796-797.

²⁹ Rose (n 27 above) 807. In this respect Bodin agreed with other *Politiques* who were of the same opinion. See further on this aspect (n 27 above) 798-799.

³⁰ Allen (n 2 above) 429; Ebenstein (n 1 above) 350.

population and therefore, promoting the integrity of the state.³¹ However, as soon as a religious denomination has been firmly established, the cost in terms of disorder and instability will be too high if action were to be taken against it. In this case it will be politically unwise to take steps. Consequently the authorities should rather allow the new religion to be practised unimpededly.

Religious tolerance as such is therefore not a principle based on theoretically founded convictions. It is a (political) strategy that can, at times, be followed to the state's advantage, just as the converse – taking action against a specific religion – may be more appropriate under different circumstances.³² It is the state, and not religious freedom, that is consequently the highest virtue and the relevant factor in determining policy. It is to the state's advantage to abandon the objective of religious unity in favour of religious freedom and, under different circumstances, also to the advantage of the state to follow a practice of allowing action to be taken against a religious denomination within certain confines.³³ What occupied Bodin here, was a strategy of state building for the sake of state's unity and integrity.

The *Politiques*' political theory recognised that two qualitatively different communities originated from the single monolithic community of the medieval imperial-ecclesiastic unity: a secular (public) political community organised as the state, in contrast with private religious communities organised in churches.

State sovereignty causes the opposing political claims of feudal or ecclesiastic origin to become irrelevant and abandoned. Religion in particular is removed from the public domain and relegated to the private sphere. With the *Politiques*, religion became a private and individual, or personal matter.³⁴ Religion lost its public appeal as a political category, because it had to yield to the new value of preference – the unity and stability of the state, which became the foremost interest and highest virtue.³⁵ The territorial state as a religious and otherwise neutral entity was victorious over religion in the sense that the integrity of the state became the primary public political virtue while religion, which could destabilise the state by striving for religious truth, was relegated to the private sphere. On the other hand, the best interest of the state also required that allowance had to be made for a certain measure of plurality of religious denominations and religious freedom. Should that not

³¹ Bodin's *Politiques* colleagues are obviously Machiavellian in this respect. See JN Figgis *Political thought from Gerson to Grotius, 1414-1625* (1960) 133.

³² Figgis (n 31 above) 130-131.

³³ Figgis (n 31 above) 133.

³⁴ Figgis (n 31 above) 124.

³⁵ Figgis (n 31 above) 124.

happen, the stability and survival of the state could be threatened. Religious freedom — the product of the *Politiques*' school of thought — is not to be ascribed to the state or natural law. The opposite is true, namely that freedom of religion gave rise to the state and that the survival of the state depends on it. Mayo formulates this as follows:

Religious freedom and toleration appear to have been adopted or enforced for political reasons — ... a quiet life, *raison d'état*.³⁶

In state-serving religious freedom we therefore find the prototypical human right (fundamental right) and prototypical liberalism. This right is the precondition for the existence of the state and also the primordial root of modern liberalism. But even more than this: from the outset religious freedom, compelled by sheer necessity as the prototypical liberal human right at the same time when the state was established, also elevated liberalism as one of the fundamental characteristics of the state.

Since the state succeeded in ousting religion as the only political category, it has jealously been guarding its monopoly over the public domain. Individuals are therefore obliged to promote their association with the state and should be citizens of the state above all else. The state accordingly utterly detests any group-forming within its confines, which may cause a group to become so important in the public domain that it could give the state a specific identity, characteristic of a certain grouping (religious, language-orientated, ethnic or similar), or that may have a divisive effect. Since the days of the *Politiques* the state has been most comfortable with individual citizens, that is to say with a number of free-floating individuals who are not more closely connected to any group than to the state and not more loyal towards the group than towards the state. The state is therefore inherently not at ease with — and sometimes even overtly inimical towards — the phenomenon of pluralism within the state, because cultural, linguistic, religious and similar groups (unlike individuals) are able to constitute a potent political force with the ability to inspire individual loyalty that is inherently able to challenge the state's monopoly to public identity in the form of state citizenship. Insofar as there are specific groups, they are to exist quietly and privately and should make an effort to keep out of the public domain, which is reserved as the exclusive terrain of the state.

The type of state that has presented itself since the time of the *Politiques* carries the imprint of a *neutral* state, which controls the population within its territorial borders by means of its legal system

³⁶ HB Mayo *An introduction to democratic theory* (1960) 145 n 3.

and where the population's particular group affiliations may have no impact at all on the character of the state. The *Politiques*' definition of a state essentially reflects a grouping of people within a delineated territory, whose common characteristic presents itself in the form of their allegiance to a common government.

The *Politiques* rejected the basic principle of the medieval notion of a state in terms of which religious truth is the foundation that supports the political order. In its stead a new value arose, namely that of *formal* peace among the state citizenry. EW Böckenförde formulates this idea as follows:

For the *Politiques*, formal peace as opposed to the horrors and sufferings of civil war, was an independent inherently justified good.³⁷

In terms of this newly-chosen value, it was not the sovereign's duty, as it had previously been, to act as the church's agent in furthering religious truth and suppressing false doctrines and heresy. Henceforth, his duty was to prevent his subjects from destroying one another in their quest for attaining religious truth³⁸ and thereby also destroying the state. The state authority has thus become the preserver of order and peace in the state, instead of being the watchdog over religious truth.

The neutral *Politiques* state comes into being amid the radical absence of real ties, which is a prerequisite for any community of human beings, and against the background of the immense problem of unabated and unsettled conflict. In view of this, the *raison d'être* of the state was to resolve conflict. The state is not a *res publica* – the communal asset of a community of citizens; it also does not lend expression to an already existing community and of a substantial lack of agreement in values. The state is indeed a product of the *lack* of communality and of *dissent* in respect of values. Consequently, the state is no more than a regulator of conflict, the mechanism by which human conduct has to be managed in such a way that the risk of mutual destruction will be avoided. This type of approach to the notion of state, which reached its peak with Hobbes, lay the foundations of the contemporary liberal territorial state.

With Bodin, a new form of citizenship appeared, which differed radically from the type of citizenship that featured in the political philosophy of Aristotle. According to Aristotle, citizenship entailed that citizens should participate in public political matters on a continuous basis. Active citizenship and involvement in the *res*

³⁷ EW Böckenförde *State, society and liberty* (translated from the original German by JA Underwood) (1981) 36.

³⁸ Böckenförde (n 37 above) 36.

publicae is of crucial importance in this regard. According to Bodin's contrasting view, citizenship is founded on the notion that the citizen should accept legal regulation by the state, in exchange for protection and the maintenance of public order.³⁹ According to Aristotle's way of thinking the citizen is an entity who, by definition, has a high public profile. Citizenship is, as it were, realised anew every day. A person becomes a citizen again when he becomes practically involved in public matters of state (the *polis*, in this case). Citizenship is therefore continuously gaining content by participating in matters concerning the *polis*. For Bodin, citizenship did not imply active participation, but a passive legal status. According to Aristotle, the citizen is linked to the state through his daily *participation* in politics. To Bodin's mind, however, the legal *status* of citizenship linked the individual to the state. In this instance citizenship does not require active *public participation* in *politics*; it entails passive *private obedience* to the law.

The religious tolerance that came into being with the *Politiques* is tolerance of a special nature. Such tolerance draws a clear distinction between the public and private spheres and applies only to the latter. In the private sphere the individual has the freedom to practice his religion of choice. This form of freedom has grown since then: freedom to live according to one's cultural, linguistic and ethnic identity, free personal expression in terms of the right to freedom of expression, as well as a free choice in respect of sexual orientation and so forth. Although this freedom has gained enormously in content, the basic principle nevertheless still applies: freedom remains restricted to the private sphere. However, in reality such freedom is not really meant for the public sphere, for the public sphere should remain neutral. If it were to be extended to the public sphere, the danger arises anew that the nature of the state could become an issue and that conflict, which can reach the proportions it had during the French religious wars, could arise again. Such view of individual freedom which one can characterise as liberal tolerance⁴⁰ is nowadays still dominant. Through this tolerance the state indemnifies its citizens against the politically harmful effects of their mutual differences, by excluding their confrontations from the public sphere.⁴¹ At the same time such freedom and tolerance has also created a new public identity, namely that of *state citizenship*. In the private sphere a person is free to live according to an ethnic, cultural, linguistic or religious identity in conformity with his personal preferences, but in the public sphere only one identity is admissible,

³⁹ J Leca 'Questions of citizenship' in C Mouffe (ed) *Dimensions of radical democracy* (1992) 28.

⁴⁰ AE Galeotti 'Citizenship and Equality: The place for toleration' (1993) 21 *Political Theory* 588.

⁴¹ Galeotti (n 40 above) 590.

namely that of state citizenship. AE Galeotti aptly summarises the correct position as follows:

Therefore whereas citizens are free to pursue their own ideals and practice their own culture and religion within civil society, in the public sphere they should disregard their special and particular membership and be 'just citizens' on an equal basis.⁴²

With Bodin, and later also with Hobbes, Locke and others, this new public identity – namely the neutral statist identity of *state citizenship* that replaced the medieval public identity of being *Christian* – was a passive identity. Rousseau and his ideological followers mobilised passive identity into an active republicanism, which often caused the destruction of the freedom of the private domain.⁴³ Nowadays the same kind of mobilisation of the identity of citizenship is employed in so-called nation building programmes.

2 Thomas Hobbes and the birth of Leviathan, the mortal god

By the last quarter of the sixteenth century, the concept of state sovereignty was established in France and England in particular. Especially in France, state sovereignty went hand in hand with monarchical absolutism. In England the proabsolutist trend also gained in strength. Sovereign absolutism plainly and simply means that the king's authority was not bound by any rules. It was absolute (*absoluta*) for it did not need to conform to any legal criteria.⁴⁴

Jean Bodin and Thomas Hobbes (1588-1679) were the two most prominent apologists of absolutism. They were, however, imbedded in a broad European trend in favour of absolutism and against opposing local (noncentralist) and ecclesiastic claims to political authority. Quentin Skinner, for example, explains that the occasional impression that Hobbes was, ideologically speaking, an isolated figure, is far from correct.⁴⁵ Hobbesian absolutism enjoyed, amongst others, the qualified support of Samuel Pufendorf, one of the most prominent jurists in the field of international law at the time,⁴⁶ while Hobbes was also quoted – sometimes approvingly – in England.

⁴² Galeotti (n 40 above) 591.

⁴³ This subject is touched upon in detail in chapter 6.

⁴⁴ E Lousse 'Absolutism' in H Lubasz (ed) *The development of the Modern State* (1964) 43.

⁴⁵ Q Skinner 'The ideological context of Hobbes' political thought' (1966) 17 *Historical Journal* 286 *et seq.*

⁴⁶ Skinner (n 45 above) 291.

The arguments put forward in favour of absolutism varied considerably. Some theorists concentrated on opposing pro-ecclesiastic claims to power and therefore spent much effort justifying royal absolutism on the basis of the divine right of kings. One of them was William Barclay⁴⁷ who influenced the absolutist convictions of the English king, James I, in the early seventeenth century⁴⁸ and of course, James himself who initially reigned over Scotland, but later also over England. James was undoubtedly the best qualified sovereign exponent of absolutism. He was absolutely convinced that the king was not subject to any temporal authority and had an inalienable right to govern, including the power to make laws.⁴⁹ James also rejected the idea that the king was bound by the common law and it was this notion of his that caused major confrontations with some English common law jurists like Edward Coke. This aspect will be discussed in chapter 8.3.4.

Bodin's influence on James especially manifested itself in the latter's views on religious freedom. Like Bodin, James was also convinced that religious freedom was necessitated in order to maintain the stability of the state.⁵⁰ This view in particular, caused James to reject any political claims of the church – both Catholic and Calvinistic.⁵¹ In this respect James was in full accord with his partial contemporary, Henri IV (of Navarre) of France.

In England, the justification of royal absolutism began to build up steam during the last quarter of the sixteenth century, with the work of Sir Thomas Smith. Initially, however, full-scale absolutism was not advocated. In the period from James I up until the dethronement of Charles I, in other words for almost the entire first half of the seventeenth century, royal absolutism gradually grew in prominence as a theory of unrestricted princely authority. After the Civil War, the royalists were on the defensive and noticeably less absolutist.⁵² Robert Filmer⁵³ was the last (mainly on the basis of historical arguments)⁵⁴ to present a powerful, albeit mainly anachronistic, argument in favour of absolutism. This was, however, merely a last

⁴⁷ GH Sabine *A History of Political Theory* (1971) 93-394.

⁴⁸ HM Chew 'King James I' in FJC Hearnshaw *The social and political ideas of some great thinkers of the sixteenth and seventeenth centuries* (1967) 111.

⁴⁹ Chew (n 48 above) 115-116.

⁵⁰ Chew (n 48 above) 123, 129.

⁵¹ Chew (n 48 above) 112.

⁵² J Daly 'The idea of absolute monarchy in seventeenth century England' (1978) 21 *The Historical Review* 235-239.

⁵³ See *inter alia* JGA Pocock (1957) *The Ancient Constitution and the Feudal Law* 151-156; Daly (n 52 above) 244-245; Sabine (n 47 above) 512-514.

⁵⁴ WH Greenleaf 'Filmer's patriarchal history' (1966) 9 *The Historical Journal* 157 *et seq.*

convulsion, because after the Glorious Revolution of 1689, absolutism no longer had a significant following in England.⁵⁵

Hobbes radically deviated from the other royalists. He was no ordinary absolutist. Hobbes' approach was modern and secular, in contrast to that of the exponents of the divine right of kings, who were forced to argue along religious lines in conformity with their focus on ecclesiastic claims to political power.⁵⁶ Hobbes was of the opinion that the state came into being on account of the needs of individual people for peace and stability.⁵⁷

Even nowadays the political perspectives of Hobbes remain of the utmost importance. His views on absolutism formed a mere subdivision of his work. His remaining insights and views have outlived his views on absolutism for many centuries and are still to this day regarded as part of daily living practice.

In contrast to Bodin, who was mainly concerned with the lamentable instability of the contemporary French state, Hobbes formulated a rationally designed and universally valid⁵⁸ theory on the reasons for state formation and the nature of the state, as well as on the functions of state government. Hobbes' political theory was thus not restricted to contemporary England. It was a universally applicable political theory which explained the basic characteristics of the newly created sovereign territorial state.⁵⁹

Hobbes was heavily influenced, however, by the exceptionally dramatic circumstances of his times. The seventeenth century background against which he produced his works is one in which individualism increasingly appeared in the foreground. The anthropological material to which Hobbes, like all the other commentators of those times, responded was not the *community* but, as Michael Oakeshott explains:

... the independent, enterprising man out to seek his intellectual or material fortune, and the individual human soul responsible for his own destiny ...⁶⁰

⁵⁵ Daly (n 52 above) 244-245.

⁵⁶ Chew (n 48 above) 127-128.

⁵⁷ Böckenförde (n 37 above) 39-40.

⁵⁸ The split caused by Hobbes in political philosophy is in accordance with the broad philosophical trend of his times in terms of which medieval scholasticism was finally discredited and Reason entered the stage as the source of human knowledge. See H-J Störig (1979) *Geskiedenis van de Filosofie* Vol I 302 and in general S Hampshire (1956) *The age of reason: the seventeenth century philosophers*.

⁵⁹ Ebnestein (n 1 above) 364 states this as follows: 'The Leviathan is not an apology for the Stuart monarchy, nor a grammar of despotic government, but a first general theory of politics in the English language' (own emphasis).

⁶⁰ M Oakeshott *Rationalism in politics and other essays* (1962) 251.

In addition, Hobbes formulated his theories against the background of the English Civil War,⁶¹ which was his paramount immediate concern.⁶² Although the war did not fundamentally shape Hobbes' political philosophy, he was definitely influenced by it. Other factors that influenced him were the discovery of the Americas and the emerging evidence on the living conditions of the Native Americans. This provided historical support to his reasoning concerning the state of nature.⁶³ Although historically contingent factors definitely had an influence on Hobbes, it was indeed justifiably remarked that his work was no mere apology for the Stuart monarchy which ruled England at the time, nor for despotic government, but that it constituted the first full-scale politico-theoretical treatise written in the English language.⁶⁴ It was the first theoretical political work explaining the fundamental nature of the modern territorial state in a rational way.⁶⁵

Hobbes deviated from the Aristotelian view that man is essentially a social being.⁶⁶ He commenced each of his three political works, *Elements of Law*, *De Cive* and *Leviathan*, by affording an explanation of human nature. In all these works man is depicted as a free-floating individual. Hobbes gradually became convinced that individuals lead a radically atomistic and mutually detached life. He grew more sceptical about the possibility of a real human social community.⁶⁷ To his mind, every individual person independently seeks to gratify his or her personal needs and avoid that which is personally unacceptable. The most basic motive behind individual conduct is to be found in

⁶¹ A Vincent *Theories of the State* (1987) 52; Sabine (n 47 above) 456.

⁶² CB Macpherson *Introduction to Thomas Hobbes' Leviathan* (1955) 9.

⁶³ R Ashcraft 'Hobbes' Natural Man: A Study in Ideology Formation' (1971) 33 *Journal of Politics* 1097.

⁶⁴ Ebenstein (n 1 above) 364.

⁶⁵ In this fundamental respect, Hobbes fits into the rationalistic intellectual climate of the period, as reflected in particular in the works of René Descartes (1596-1650). Manifestly deeply touched by the disruption caused by the assassination of Henri IV and the destruction wrought by the Thirty Year's War, Descartes tried to find an unassailable intellectual strategy that could bring about certainty of knowledge (in science), but could be equally beneficial to politics, which at that stage found itself in a great crisis and consequently exposed to bloody conflict. Descartes did not find this unassailable strategy in the traditions of social knowledge and wisdom, but in one thing only, which to his mind was certain, namely the individual's awareness of the existence of his own mind. It is from the individual mind that rational knowledge can be conceived and a public order can also be created accordingly. On this topic see in general S Toulmin *Cosmopolis: The hidden agenda of modernity* (1990) especially 45-88.

⁶⁶ CD Tarlton 'The Creation and Maintenance of Government: A neglected dimension of Hobbes' *Leviathan*' (1978) 26 *Political Studies* 311.

⁶⁷ B Missner 'Scepticisms and Hobbes' political philosophy' (1983) 44 *Journal of the History of Ideas* 407 *et seq*; Commentaries on Hobbes' works vary in accordance with the specific work utilised as source for the specific commentary. Those commentaries mainly supported by *Elements of Law* and *De Cive* – like that by R Tuck Hobbes (1989) – do not cause the same antagonistic condition in which man finds himself in the state of nature, as the commentaries heavily supported by *Leviathan*.

these conflicting individual ‘appetites and aversions’. Individuals stand apart existentially and therefore cannot communicate with one another in a proper and reliable way. Consequently they are not able to resolve their mutual competing claims. This causes individuals to live in an atmosphere of constant mutual distrust, while trying to realise their conflicting claims and aspirations. All people act in this way. It gives rise to a condition of general conflict. The only rational way to handle this conflict situation is to strive for power. By finding oneself in a stronger position of power than other individuals, you can ensure that you are able to realise your individual needs. Of course, at the same time this has the effect that other individuals, who are less powerful, are prohibited from realising their (conflicting) claims and needs. The preferred way of conduct for every individual person is to maximise his personal power in order to trump other individuals: power must be amassed to combat any opposing power. Accordingly, Hobbes defined power in dynamic terms, namely power in a continuous antagonistic relationship with opposing power, and net superiority over conflicting power claims.

And because the power of one man resisteth and hinderith the effects of the power of another; power simply is no more, but the excess of the power of one above that of another.⁶⁸

Every individual person now finds himself in a state of continuous conflict to gain superiority over other individuals. It is also true that everybody does not have the same needs and aspirations and that many people are quite moderate. On the other hand, however, there are also those whose needs are so enormous that they even seek to encroach on the most basic needs of more moderate people. Due to the general prevalence of a craving for power in mankind (in order to satisfy their personal needs) and the extreme craving for power of some (to satisfy their excessive needs), man’s natural situation in the state of nature is one of constant war.

I put for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth only in Death. And the cause of this is not always that a man hopes for a more intensive delight, than he has already attained to, or that he cannot be content with a moderate power: but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.⁶⁹

What makes the situation in the state of nature even more intolerable, is that all people are fundamentally equal, not only in

⁶⁸ Thomas Hobbes *The Elements of Law: Natural and Political* (ed F Tönnies) (1969) Part I ch 8.4 34.

⁶⁹ Thomas Hobbes *Leviathan* (1985) 161.

respect of their needs and aspirations,⁷⁰ but also in respect of their abilities. In this regard Hobbes states:

For as to the strength of the body, the weakest has the strength enough to kill the strongest, either by secret machination, or by confederacy with them, that are in the same danger with himselfe.⁷¹

If the natural situation was one of inequality, there would have been order, albeit a hierarchical structured order. The state of equality, however, in fact only promotes the impasse of continuous and unsettled strife, as Hobbes so aptly describes in the following famous passage from *Leviathan*:

In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building, no Instruments of moving, and removing such things that require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short.⁷²

This is a sombre depiction of the state of nature, but at the same time the rationally inspired escape from this lamentable condition is also contained in the depiction. This is the position: The continual fear of death that afflicts man in his state of nature forces him to utilise his rational abilities to enable him to escape to a better condition, namely that of the state – the *commonwealth*. The commonwealth is created by means of a social contract.

Hobbes revealed the rational way to the establishment of the state by means of the social contract by declaring that everybody has natural rights, namely the right to life, bodily integrity and property. In addition, everybody also has the inalienable right to protect these legal interests. In the state of nature it is impossible to protect these basic interests due to the uncertain condition in which man finds himself – on account of the *bellum omnia contra omnes* (everybody's war against everybody). Hobbes' presentation of the disconsolate condition of the state of nature brings to light that the state of nature indeed precludes the realisation of these fundamental rights. To enable these rights to realise, it is rationally imperative that the commonwealth should be established by means of the social contract.

⁷⁰ Hobbes (n 69 above) 184.

⁷¹ Hobbes (n 69 above) 183. See also Hobbes (n 68 above) Part I ch 14.1.2. 70.

⁷² Hobbes (n 69 above) 186. There is a similar definition of the state of nature in Hobbes (n 68 above) Part I ch 14.12 73.

All individuals are parties to such social contract. With this contract all individuals enter into a mutual agreement with all other individuals. The performance (conduct) due by each individual contracting party is that everybody abandons the natural right that enables him to control and protect his own interests, provided that every other contracting party will also abandon his identical right accordingly. In terms of the contract, all people therefore transfer their natural rights that enable them to protect their personal interests (i.e. to take the law into their own hands) to a single person, or a single council of persons.⁷³ Henceforth, a permanent duty rests upon such person or council to protect the interests of each and every contracting individual in an efficient manner.

The creation of the state (commonwealth) has the ultimate objective of protecting and stabilising everybody's natural individual rights – namely to protect his survival and material well-being.⁷⁴ The creation of this commonwealth or, in the words of Hobbes, the *Mortal God*,⁷⁵ condensed the collection of antagonistic individual wills, which made the state of nature so miserable, into a single will. This is the potent will of the state government – the *Leviathan* (the mortal god) – being the:

... Mortal God to which we owe, under the Immortal God, our peace and defence.⁷⁶

According to Hobbes' doctrine the concepts of state (commonwealth) and government are so closely interrelated that the two cannot be distinguished. By definition the state is an entity resorting under a single centralised authority. Should the latter fall away, the former cannot exist. The state (and government) owes its existence and legitimacy to the fact that it is an effective protector of individual rights, for that really is the reason for its establishment. Although he is obliged to be efficient, *Leviathan* is no tyrant and he is not entirely free to act according to his own will. The reason for state formation lies in the fact that it must remove the eternal state of terror and infringements of interests prevalent in the state of nature, and replace it with safety and legal protection.⁷⁷ In view of the fact that this duty is borne by Hobbes' *Leviathan*, it is not nearly as absolutist as one is often made to believe. *Leviathan* – the mortal god – must perform his duty to protect interests meticulously. Should *Leviathan*

⁷³ Hobbes (n 69 above) 227.

⁷⁴ T Nagel 'Hobbes' Concept of Obligation' (1959) 68 *The Philosophical Review* 69, 74, 91.

⁷⁵ Hobbes (n 69 above) 227 (The Latin term *civitas* is employed as a synonym for commonwealth.)

⁷⁶ Hobbes (n 69 above) 227.

⁷⁷ MacPherson explains that Hobbesian political theory served the bourgeoisie community, who is in particular need of order and stability in order to pursue private interests as efficiently as possible. See MacPherson (n 62 above) 51-63.

act beyond the confines of his duties, the duty of obedience towards him will lapse. The sovereign is also unable to force the subject to act to his own detriment. In terms of Hobbes' reasoning there are no mechanisms that can force the sovereign to perform his duties. In fact, Hobbes was far from keen to have such mechanisms, fearing that it could undermine the integrity of the sovereign government to the detriment of its subjects. The sovereign authority of the state is created to protect its subjects. Should it be restricted by control mechanisms, it could detrimentally affect the population. For that reason government's *duties* under the social contract are not expressed in terms of corresponding *rights* vested in the subjects. On the contrary, it is approached in terms of *duties* that rest upon the authorities. For this reason Hobbes may perhaps appear rather pre-modernist. This impression, however, is erroneous, since modern (second-generation) economic rights, contained for example, in the International Covenant on Economic, Social and Cultural Rights⁷⁸ and the European Social Charter,⁷⁹ also do emphasise the vesting of rights in individuals, but rather of duties that rest upon the state.

According to Hobbes, government should not only accept the duty of guaranteeing peace and safety, but should also take certain steps to protect socio-economic interests.⁸⁰

The rationale for state formation is to exercise power for the benefit of individual state subjects. Although Hobbes' mortal god is powerful by reason of this sovereign authority, it is at the same time a beneficial entity. One can therefore more aptly call Hobbes the pathfinder of enlightened despotism, rather than an advocate of unbridled absolutism. Moreover, the benefits that the state should bestow on its subjects place Hobbes within the framework of utilitarian doctrine. As William Ebenstein puts it:

The Hobbesian monarch cannot hide his ineffectiveness behind divine or traditional authority. He must 'deliver the goods' if he is to retain his regal office.⁸¹

Hobbes' enlightened despotism and his (ostensible) absolutism are a far cry from any form of statist totalitarianism. He completed his work before the era of the totalitarian state.⁸² His Leviathan does not involve the population in ideological and socio-economic

⁷⁸ United Nations Convention in terms of Resolution 2200 of the General Assembly adopted on 16 December 1966 and in force since 3 January 1976.

⁷⁹ Convention of the European Council adopted on 18 October 1961 and in force since 26 February 1965.

⁸⁰ See for example (n 67 above) 70-72.

⁸¹ Ebenstein (n 1 above) 369.

⁸² For a distinction between the concepts of absolutism and totalitarianism, see for example Lousse (n 44 above) 44-45.

programmes. In terms of totalitarian politics, the distinction between the civil and private sphere on the one hand, and the public domain on the other, is denied and the state also manages the private lives and civil activities of individuals in minute detail.⁸³ This appears nowhere in Hobbes' doctrine. His state preserves peace, order and stability and confines itself within the strictly defined parameters of the public domain.⁸⁴ Hobbes' state merely regulates and alleviates individual antagonism and conflict and furthermore, facilitates individual relationships in the bourgeoisie state.

Although Hobbes was by no means totalitarian, he strongly preferred the idea of the monistic state. Consequently, he was extremely wary of any form of pluralism. This sentiment was a logical result of his entire political doctrine: the state is formed with the object of establishing and maintaining peace. When group-forming occurs, the possibility of mutual strife arises, which can plunge the state into civil war and can in fact create the danger of compromising the survival of the state. England and Europe, in the era of Hobbes, present us with abundant proof of the latent danger in the existence of different groups within a single state, in particular in view of the intense conflict that was raging at the time. Hobbes' main fear therefore, was that civil war could break out again.⁸⁵ The root of evil in civil war lies in the divergent views and convictions of different groups in a pluralistic state, which can develop into real conflict if it is not properly controlled. For the sake of peace, government therefore has to exercise control over the root of evil, namely the diverging convictions that exist within the state. In this way civil war can be prevented.

It belongeth therefore to him who hath the Sovereign Power, to be the Judge, or constitute all Judges of Opinions and Doctrines, as a thing necessary to Peace, thereby to prevent Discord and Civill Warre.⁸⁶

Fear of the potential for conflict inherent in antagonistic convictions explains why Hobbes held the opinion that the state had to exercise doctrinal control over the church. In doing so the state could prohibit the church from inciting people, through subversive doctrines, to launch actions that could undermine the state and disturb the public order.⁸⁷

⁸³ G Sartori *Democratic Theory* (1962) 146.

⁸⁴ Ebenstein (n 1 above) 370.

⁸⁵ According to Macpherson (n 62 above) 9.

⁸⁶ Hobbes (n 69 above) 233.

⁸⁷ For this, see in general EJ Eisenach 'Hobbes on church, state and religion' (1982) *History of political thought* (1982) 217 and in particular also 236-237; Tuck (n 67 above) 73-74; Tarlton (n 66 above) 321-322.

Although Hobbes differed from Bodin on the details of the exact approach to be taken in respect of religion and the churches, they thoroughly agreed on the broad strategic aim, namely that religious denominations should be treated in such a way that they could never threaten the stability of the state. Religious *dogma* was irrelevant for both Bodin and Hobbes. They approached the issue of religion from a *strategic* angle by merely focusing on that which would be most advantageous for the maintenance and integrity of the state. Both regarded pluralism as an inherent potential threat to the integrity of the state and the maintenance of public order. Similar to the *Politiques*, Hobbes made a well-considered choice in favour of formal peace (maintained by Leviathan). He also rejected the notion that the state must take on the same character as one of the groupings in the state. Hobbes continued the *Politiques*-inspired aversion of group formation within the state and was also of the opinion that the control of groups and group formation had to be entrusted entirely to the sovereign's judgment.

Hobbes' dislike of (potentially subversive) plurality ultimately entailed that the state and the *individual* were the only entities that could be accommodated in his state theory. There is some room for groups, provided that they display the label '*strictly private*' and act in close conformity with such label, meaning that groups may have no public political profile and may not encroach upon the public domain. It is Leviathan's task to see to this.

The most crucial aspect of the Hobbesian state theory is that Hobbes proceeded from the assumption that there is a radical lack of any real human community (*Gemeinschaft*). He represented the prototypical antithesis of a communitarian approach and political dispensation. To his mind, no community as such exists, but only a *huge number* of people – *multitude of men* – constantly competing against one another in a spirit of mutual mistrust, suspicion, tension and undeclared war, in order to secure the attainment of antagonistic individual aspirations. The state also does not endeavour to create a community but concentrates on its main task – in fact its only task – namely to ensure that competing individuals do not destroy one another. The state is not the personification of human community (or, more accurately, the *res publica* of the citizenry), but is merely the authority that bears the responsibility of containing the antagonistic conduct of competing individuals. If this authority or referee were to withdraw, the unbridled strife of the state of nature would resume in all severity. The state is therefore only a legal institution; it is no community.

The radical absence of any real human community that entails the treatment of human society as one consisting of antagonistic individual atoms constantly embroiled in mutual hostilities,

constitutes the fundamental premise of the Hobbesian state and statist theory.

In the centuries since Hobbes, this premise has remained the same. In modern legal theory and practice the selfsame premise is still accepted. As will be demonstrated shortly, certain contemporary institutions like human rights still proceed from the same premise, although they would at first glance appear to entail a much more positive attitude towards human society.

3 John Locke, the *constitutional* continuation of Thomas Hobbes

John Locke (1632-1704), the most eminent and most famous exponent – at least in the English world – of the liberal tradition in politico-legal theory, formulated his own politico-legal thinking in his works *Two Treatises of Government* and *A Letter Concerning Toleration*. The former was published in two volumes. In the first, one finds Locke's detailed treatment of Robert Filmer's *Patriarcha*, which contains an apology for sovereign absolutism. Locke's formulation of the principles of civil government appears in the second volume. In the second *Treatise* Locke also responds to the legal and political views expressed by his great adversary, Thomas Hobbes. Just how important patriarchy⁸⁸ was in those times, is also evident from the second *Treatise* in which Locke still grappled with this notion.⁸⁹

Locke's works have had a lasting influence on Western political thought. His work was, however, aimed at achieving real influence on the constitutional struggle raging in England at the time. Locke was closely involved in the political movement that opposed⁹⁰ the absolutist trends displayed by the English monarch, King James II. In fact, in the 1680s Locke lived in exile in the Netherlands for a long period of time, while the struggle against the absolutist strategy of James continued. After James had been deposed and following the Glorious Revolution of 1688-1689, he returned to the England of his dreams – an England where a constitutional monarchy had been established.

Locke exerted a particularly strong influence on American political and constitutional schools of thought.⁹¹ His influence could

⁸⁸ MP Thompson 'The Reception of Locke's Two Treatises of Government 1690-1705' (1976) 24 *Political Studies* 189.

⁸⁹ For example in J Locke *Of Civil Government* (Second Treatise) (1992) chapters 1, 6, 7 (paras 77 -80).

⁹⁰ J Dunn Locke (1984) 9-10.

⁹¹ WT Bluhm *Theories of the Political System* (1984) 294; Sabine (n 47 above) 539; Ebenstein (n 1 above) 400.

likewise be perceived in eighteenth century revolutionary thought in France.⁹² Locke also made his mark in England, even though it would probably be incorrect to accept that his works were of major importance immediately after the Glorious Revolution.⁹³ At the time, other liberal political theorists like James Tyrell (1642-1718) and Samuel Pufendorf (1632-1694) enjoyed much more political prominence.⁹⁴ Furthermore, Locke was definitely not completely original in his thought. Many of the thoughts expressed in the *Treatises* had already been adhered to previously.⁹⁵ In addition, although Locke is quite often depicted as a revolutionary, he gleaned many ideas from the notions of medieval constitutionalism.⁹⁶ This is borne out by the fact that he often quoted Richard Hooker (1554-1600).

In his thought Locke also gave impetus to the development of the right to religious freedom. Like Bodin, Locke also supported religious freedom for the sake of the stability of the state, but in contrast to the mainly preliberal Bodin, Locke clothed religious freedom with a much more individual, or rather liberal, character. According to Locke, somebody's religious convictions are of an internal personal character,⁹⁷ while the commonwealth (state), on the other hand, concerned itself with *external* matters. External enforcement measures aimed at changing personal convictions are therefore unbecoming. Furthermore, they are also ineffective, because it is impossible to determine the success or failure thereof with any measure of certainty.⁹⁸ There should be a clear dividing line between state and church. Steps taken against a member by the church, like excommunication, may not be accompanied by state sanctions. The state may thus not act as an agent of the church.⁹⁹ Likewise, any form of ecclesiastic jurisdiction over matters of state is also prohibited¹⁰⁰ and nobody may be excluded from the state by reason of his religious

⁹² Sabine (n 47 above) 539.

⁹³ Thompson (n 88 above) 184 *et seq*; MP Thompson 'Reception and Influence: A Reply to Nelson on Locke's Two Treatises of Government' (1980) 28 *Political Studies* 100, contra JM Nelson 'Unlocking Locke's legacy: A comment' (1978) 26 *Political Studies* 202 *et seq*. Nevertheless, after publication Locke's works quickly caught the eye. This is evident from the prompt publication of further editions of his *Treatises* and also from the fact that his ideas quickly found their way into more popular publications. See for example R Ashcraft & MM Goldsmith 'Locke, Revolution and Principles, and the Formation of Whig Ideology' (1983) 26 *Historical Journal* 772, 774, 786, 800.

⁹⁴ Thompson (n 88 above) 184-85, 187.

⁹⁵ (n 88 above) 184.

⁹⁶ Sabine (n 47 above) 524.

⁹⁷ J Locke *A letter concerning toleration* (eds J Norton and S Mendes) (1991) 14, 18.

⁹⁸ Locke (n 97 above) 18.

⁹⁹ Locke (n 97 above) 23.

¹⁰⁰ Locke (n 97 above) 25.

convictions.¹⁰¹ This type of argument brands Locke as a modern liberal.

Locke, however, also advanced another argument in favour of religious freedom, thereby illustrating the resemblance that existed between him and Bodin. To Locke's mind, the way in which religious freedom is handled, must conscientiously accommodate the need to guarantee stability in the state. He therefore argued that it is indeed necessary for the state to exercise jurisdiction over religious issues, insofar as it could influence the stability and interests of the state.¹⁰² In Locke's state there is no freedom to follow any religious doctrine, in terms of which the ruler must be deposed on account of his adherence to false religious dogma.¹⁰³ Just like Bodin, Locke thus rated state order higher than doctrinal religious truth.¹⁰⁴ The effect of the Lockean view of the relationship between state and church is that the state lacks any jurisdiction over the (internal) religious beliefs held and preached by the church. The state does, however, have jurisdiction in respect of the (external) realisation of religious convictions, insofar as it may impact on state interests.¹⁰⁵ Although only individuals can exercise the right to religious freedom, the state still remains an interested party. The individual right to religious freedom will be restricted to the extent required by the interests of state. One can conclude that individual persons and the state have an equal stake in religious freedom, because religious freedom must serve both the individual and the public interest.

Locke's general state and legal doctrine is even more enlightening than his views on religious freedom. In retrospect, Locke was first to offer a comprehensive apology for constitutional government, accompanied by criticism of absolutism. As explained, Hobbes did not grant government the absolute freedom to act arbitrarily. He required government action to benefit to the subjects. Locke's justification of constitutional government made him the primary opponent of Hobbes and his absolutistic tendencies.

Like Hobbes, Locke constructed the commonwealth (the state) from the precivilian state of nature. In terms of Locke's doctrine the state of nature was abolished by way of a social contract to which all people in the state of nature were parties and replaced with the commonwealth.

¹⁰¹ Locke (n 97 above) 51. Of course, Locke remained a Christian philosopher. To his mind religious freedom stretched as far as the ways in which a person can live up to his Christian convictions. This right is not destined for atheists. See 47 above.

¹⁰² Locke (n 97 above) 37.

¹⁰³ Locke (n 97 above) 46.

¹⁰⁴ Dunn (n 90 above) 24.

¹⁰⁵ Dunn (n 90 above).

The Lockean state of nature is one in which there is absolute individual freedom,¹⁰⁶ as well as equality.¹⁰⁷ Locke was of the opinion that historical evidence proved that the state of nature had indeed preceded the commonwealth. To Locke's mind the reason why there is no historical record of the transition from the state of nature to the commonwealth is simply that people had already grasped the wisdom of replacing the state of nature with the commonwealth at a very early stage and had thus already concluded the social contract very long ago.¹⁰⁸

The freedom that prevailed in the state of nature did not entail completely unregulated profligacy.¹⁰⁹ Natural law regulated the state of nature. Although Locke conceded that natural law is not an inborn characteristic of man, he stated that man could gain knowledge of natural law through active reason.¹¹⁰

Locke rejected the Hobbesian description of the dreadful condition of continuous strife in which people allegedly lived in the state of nature. He even devoted a separate chapter to the state of war, which he clearly distinguished from the state of nature¹¹¹ and – manifestly with Hobbes in mind – rejected the identification by ‘some men’ of the state of war and the state of nature.¹¹²

The right – the natural rights – available to everybody in the state of nature is the right to property, not in its modern property law meaning, but which encompasses the right to life, freedom and property.¹¹³ According to Locke, the fundamental legal problem in the state of nature – expressed in modern terminology – is not of a substantive, but of a procedural nature. In the state of nature, everybody was obliged to apply and enforce the law. Everybody had the right to punish offenders.¹¹⁴ In this state, in which the dispensation of justice was a matter of self-help, all people were in reality members of the executive and judicial authority.¹¹⁵ Although legal certainty as to the content of substantive law existed in this

¹⁰⁶ J Locke *Of Civil Government (Second Treatise)* (1992) paras 4, 87, 95.

¹⁰⁷ Locke (n 106 above) paras 4, 87, 123.

¹⁰⁸ Locke (n 106 above) paras 100-106.

¹⁰⁹ Locke (n 106 above) para 6.

¹¹⁰ JW Yolton ‘Locke on the law of nature’ (1958) 67 *The Philosophical Review* 477 *et seq.*, points out that Locke’s epistemology and his views on natural law are in agreement for the most part. Reason, by means of which knowledge of natural law is acquired, is in fact part of the (empirical) tools that enable man to acquire knowledge. See in particular 482.

¹¹¹ Chapter 2 of the second Treatise (n 106 above) treats the state of nature, while the state of war is discussed in chapter 3.

¹¹² Locke (n 106 above) para 19.

¹¹³ Locke (n 106 above) para 87.

¹¹⁴ Locke (n 106 above) para 7.

¹¹⁵ Locke (n 106 above) paras 13, 125.

state, its application fell short.¹¹⁶ It was indeed this procedural dysfunction that gave rise to the founding of the commonwealth. The establishment of the commonwealth therefore did not bring new rights into being, but merely created effective procedural mechanism to ensure the enforcement of existing (natural) rights. This argument stood central to Lockean constitutionalism and at the same time represented the fundamental difference between Locke and Hobbes. According to Locke, man's natural law rights did not terminate when the commonwealth came into existence. On the contrary, in the commonwealth these rights have to be particularly safeguarded:

... for truly so are a great part of the municipal laws of countries, which are only so far right as they are founded on the law of nature, by which they are to be regulated and interpreted.¹¹⁷

With Locke, we are therefore confronted by what can be described as natural law constitutionalism,¹¹⁸ lucidly summarised as follows in Locke's own words:

Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rule that he makes for other men's actions must, as well as their own, and other men's actions be conformable to the law of nature ...¹¹⁹

Civil government – the commonwealth – did not bring about any change in the legal position of the state of nature. Civil government is merely a proper remedy for the (procedural) inconvenience encountered in the state of nature.¹²⁰ Against this background Locke describes the commonwealth as follows:

Wherever therefore, *any number of men*, so unite into one society, as to quit everyone his executive power of the law of nature, and to resign to the public, there, and then only, is a political, or civil society. And this is done wherever *any number of men*, in the state of nature, enter into society, to make one people, one body-politic, under one sovereign government ...¹²¹ (own emphasis).

¹¹⁶ Locke (n 106 above) para 127. There is a remarkable resemblance between the analytical legal theory of HLA and Locke's exposition of the nature and defects of the state of nature. The problems in the state of nature – the primitive condition before the establishment of civil law – are of a procedural nature. In terms of Hart's doctrine these problems are solved by adding secondary rules – rules of identification, change and adjudication – to the primary rules already present in a primitive society, in order to establish a properly functioning legal system. For this, see HLA Hart *The Concept of Law* (1961) 77-96.

¹¹⁷ Locke (n 106 above) para 12.

¹¹⁸ See *inter alia* Locke (n 106 above) paras 131, 134, 202.

¹¹⁹ Locke (n 106 above) para 135.

¹²⁰ Locke (n 106 above) paras 13, 90.

¹²¹ Locke (n 106 above) para 89.

The aim and the result of founding the commonwealth is the creation of a sufficiently effective system of procedural law. With the advent of civil government, a referee – an arbitrator – appeared on the scene to judge conflicts between individuals over conflicting personal interests. The aim of the improved juridical organisation was the maintenance and protection of individual legal interests.¹²² In fact, the only reason why people abolished the state of nature in favour of the commonwealth, was the more effective way in which the latter can protect the individual interests of human life, personal freedom and property.¹²³

Within the historical context in which Hobbes and Locke operated, they represented antipoles on the political spectrum. This still holds true, notwithstanding the fact that Hobbes, as argued earlier, cannot merely be regarded as an absolutist.

Seen from a broader historical perspective, however, there are fundamental politico-philosophical similarities between the two great masters. In fact, they are cocreators and coexponents of the same statist paradigm. There are crucial similarities between Hobbes and Locke that establish them as the cofounders of the same statist paradigm.

Firstly: the Hobbesian exposition and evaluation of the state of nature bear witness to a radically atomistic existence without any human community. As mentioned before, Locke did not really describe the state of nature in the same disconsolate terms. Locke's anthropology, however, as his description of the state of nature shows, testifies to the same radical lack of human community. In *A Letter Concerning Toleration* Locke expressed himself as follows:

But the pravity of mankind being such, that they had rather injuriously prey upon the fruits of other men's labours than take pains to provide for themselves; the necessity of preserving man in the possessions of what honest industry has already required, and also of preserving their liberty and strength, whereby they might acquire what they further want, obliges men to enter into society with one another; that by mutual assistance and joint force, they may secure unto each other their properties, in the things that contribute to the comforts and happiness of this life; leaving in the meanwhile to every man the care of his own eternal happiness, the attainment whereof can neither be facilitated by another man's industry, nor can the loss of it turn to another man's prejudice, nor the hope of it be forced from him by any external violence ...¹²⁴

¹²² Locke (n 106 above) paras 87-88, 124, 127; Locke (n 97 above) 17, 43, 44.

¹²³ Locke (n 106 above) para 131.

¹²⁴ Locke (n 97 above) 43.

This statement by Locke on human nature and the lack of human community shows great similarity to Hobbes' pessimistic description of the reigning condition of the state of nature. In his second *Treatise* Locke continued in the same vein. Answering his own question as to why man prefers the commonwealth, despite the freedom he enjoyed in the state of nature, Locke delivers the following explanation:

... though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasions of others. For all being kings as much as he, every man his equal, and the greater part no strict observers of equality and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition, which, however free, is full of fears and continual dangers.¹²⁵

Somewhat later¹²⁶ Locke refers to the '*corruption and viciousness of degenerated men*', which caused people to prefer the commonwealth to the state of nature. Again, Locke sounds like Hobbes and the reigning conditions of Locke's state of nature reminds one of the Hobbesian *bellum omnia contra omnes*.

This brings us to the conclusion that, to a great extent, Hobbes and Locke shared the same basic premises. Both believed that people are free-floating atoms, bereft of any real human community and that they are in mutual conflict (always potential and often real) as a result of fundamentally conflicting individual interests.

Secondly: those who establish the commonwealth are likewise not a community of people, but merely a number of people — '*any number of men.*' This phrase often appears in Locke's second *Treatise*.¹²⁷ There is no community of people, who establish a common *res publica*, but merely a fortuitous number of people whose sole aim is to realise their private individual aspirations. Once again, one can see the resemblance with Hobbes.

This premise had paradigmatic implications, because after Hobbes and Locke, liberal scholars have focused primarily on the relationship between the *individual* and the *state*.¹²⁸ As a result of their individualistic (atomistic) premises, the liberals have almost always avoided any discussion concerning a description of the citizenry. Questions relevant to issues such as the following are simply avoided: those dealing with the relative homogeneity or heterogeneity of the national population; whether the national

¹²⁵ Locke (n 106 above) para 123.

¹²⁶ Locke (n 106 above) para 128.

¹²⁷ Locke (n 106 above) paras 89, 95, 96.

¹²⁸ V Van Dyke 'The individual the state and ethnic communities in political theory' (1976-77) 29 *World Politics* 343.

population can meaningfully be regarded as citizens in the light of its heterogeneity; whether the population should indeed belong in one state and whether the national frontiers should not be redrawn; how the constitutional dispensation of a state should be shaped in order to accommodate a deeply divided heterogeneous population on a proper basis of equality and so forth. Due to an almost exclusive obsession with the relationship between the state and the individual it was not possible to develop a proper constitutional theory in terms of the liberal school of thought. Vernon Van Dyke draws attention to this as follows:

Hobbes speaks of a 'multitude of men,' and Locke of 'any number of men' making a covenant. Neither attempted to characterize the men – nor saying for example whether the men shared a common language or religion.¹²⁹

In another passage Van Dyke comments on the same issue as follows:

Leading British and French political philosophers took the same general view. Locke seems to have simply assumed that those who have joined in the social contract would be homogenous in a racial, linguistic and cultural sense.¹³⁰

Liberal scholars view the state in the same uncritical light as they regard people (individuals, groups). John Rawls, the great liberal scholar of the second half of the twentieth century, still keeps track with Hobbes and Locke in this regard. He views the existing territorial state as a fixed and obvious given – 'a kind of happening' as Van Dyke puts it¹³¹ and then, without a moment's critical thought, he proceeds as if the state were some or other invariable general proposition of physics.

Thirdly: Locke also agreed with Hobbes that the establishment of the commonwealth ultimately takes place to fulfil personal, selfish aspirations and in particular, to protect property.¹³² In *A Letter Concerning Toleration* Locke declared:

The commonwealth seems to me to be a society of men constituted only for the procuring, preserving and advancing their own civil interests.¹³³

¹²⁹ Van Dyke (n 128 above) 347; See also W Connor 'The Politics of Ethnonationalism' (1973) 27 *Journal of International Affairs* 5.

¹³⁰ V Van Dyke 'Human Rights and the Rights of Groups' (1974) 18 *American Journal of Political Science* 726. Van Dyke further expands on Rousseau and Mill in the same vein.

¹³¹ Van Dyke (n 128 above) 348.

¹³² Locke (n 106 above) paras 88-90, 124, 128, 131; Locke (n 97 above) 17, 43, 44.

¹³³ Locke (n 97 above) 17.

Hobbes and Locke differed on the *mechanics* of the state: Locke was the strict constitutionalist, while Hobbes appeared to be an arbitrary absolutist. They did, however, agree on what formed the *foundation* of the state: The state – the commonwealth – came into being as a result of the radical lack of human community and the uncertainty, dangers and conflict of the state of nature, in which the realisation of private individual interest is impossible. The state was created as a selfish strategy to advance personal interests. By exercising its executive power effectively and through its functions as arbitrator, the state guarantees the realisation of private interests. The state does not come into being because of the existence of a genuine human community or the experience of community, nor is the state the creator of such a community. On the contrary, the real reason behind the creation of the state is the lack of community. The state is merely the facilitator of the private individual interests of a multitude of detached and mutually antagonistic individuals, who have nothing in common.

Regarding all of this, Hobbes and Locke were in agreement. They were thus exponents of the same atomistic individual (proto-liberal) state: the Hobbesian mortal god and the Lockean commonwealth.

4 Interstatism and Hugo Grotius

In a politico-theoretical sense Jean Bodin, Thomas Hobbes and John Locke rounded off the historical revolution that had commenced with the Lutheran revolution – the Reformation. The universal religion-driven *Republica Christiana* abandoned its historical niche to make way for the plurality of territorial states – commonwealths or, in dramatic Hobbesian parlance, Leviathan(s) or mortal gods. Henceforth it replaced the previous universal Christian republic as the central theme of political philosophy and legal doctrine. It also became the primary supplier of public identity, initially to Western man and subsequently to all the regions where the influence of the Western World was felt.

The territorial states were settled in Western Europe in the seventeenth century. The way in which the mutual relations among states should be regulated, however, still had to be devised. One can formulate this as follows: The historical events since Luther and the scholarly works of Bodin, Hobbes and Locke in particular, at long last brought some clarity about the new phenomenon of *statism*. The way in which interstate relations would henceforth be regulated in a divided Christian world, was, however, far from certain.

Earlier, during the Middle Ages when the *Republica Christiana* was still paramount, interstate relations among the underdeveloped

rudimentary states were in, the final instance, regulated by the church – more specifically, the pope.¹³⁴ In earlier times, however, certain questions touching upon the relations among political entities, for example war and the treatment of ambassadors, were investigated by scholars. In typical conformity with the religion-inspired medieval mentality, however, law was neither separated from theology, nor from ethical issues. Furthermore, no clear distinction was drawn between domestic and *international* questions.¹³⁵ In a universal politico-religious dispensation like that of the Middle Ages, such distinctions were simply irrelevant and therefore never broached.

The Reformation finally changed everything. In the religiously divided post-Reformation world the church had to abandon its power. In the Roman Catholic part of Europe there was still the possibility of applying canon law as basis for the regulation of interstate relations. However, the Protestants rejected the authority of canon law. In terms of their legal reasoning they were striving to find a secular foundation on the basis of which interstate relations could be organised.¹³⁶ Even in the Catholic world the church had lost its political authority for the most part.¹³⁷

Besides the religious schism that occurred, the territorial states had also been developing for a considerable period of time.¹³⁸ After the Peace Accord of Westphalia in 1648, which signalled the end of the Thirty Years' War, the permanent territorial state received further formal recognition. It heralded the acceptance of a new political order in Western Europe,¹³⁹ from which territoriality – the new sovereign territorial state – would finally be victorious and in which the notion of a *family of territorial states*, instead of an *ecclesiastically organised united Christendom*, became the new basis of global relations.¹⁴⁰ It was especially the particular brutality of the religion-inspired wars¹⁴¹ that followed upon the Reformation, that made it imperative to find a new set of effective rules to replace the obsolete theological regulation of global relations.

¹³⁴ GN Barrie 'Die betekenis van De Groot vir die Internasionale Reg' (1983) 46 *Journal of Contemporary Roman Dutch Law* 173.

¹³⁵ JL Brierly *The Law of Nations: An Introduction to the International Law of Peace* (ed H Wadlock) (1963) 25.

¹³⁶ Sabine (n 47 above) 416.

¹³⁷ Brierly (n 135 above) 5.

¹³⁸ The issue is discussed in detail in chapter 3.4 and 3.5.

¹³⁹ JA Walker *A History of the Law of Nations* Vol I (1899) 147.

¹⁴⁰ FJC Hearnshaw 'Hugo Grotius' in FJC Hearnshaw (ed) *The Social and Political Ideas of Some Great Thinkers of the Sixteenth and Seventeenth Centuries* (1967) 139; Walker (n 139 above) 148; Jolowicz (n 24 above) 50.

¹⁴¹ The unparalleled brutality of the wars was one of the things which greatly alarmed Grotius. See Barrie (n 134 above) 173.

What was needed right then, was a new set of principles that would transcend the religious schism and remove the discord, and also take the establishment of the new territorial states into consideration – principles that could be, as it were, broad and flexible enough to be authoritative in the religiously plural and territorially fragmented world. A new international, or rather interstate law entered the stage. It was based on a *secular* interpretation of natural law and therefore satisfied the requirements of the new dispensation.¹⁴²

The exponents of the new natural law included the following: Francisco de Vitoria (1492-1546), Alberico Gentili (Gentilis) (1552-1608), Hugo Grotius (1583-1645), Richard Zouche (1590-1660), Samuel Pufendorf (1632-1694), Cornelis van Bynkershoek (1673-1743) and Emerich de Vattel (1714-1769).¹⁴³ Admittedly, they had their mutual differences. Some, like Grotius and Pufendorf, espoused natural law, while Bynkershoek followed a more positivist trend. Zouche, in turn, regarded state practice as the most important source of law.¹⁴⁴ They were, however, in agreement on one crucial aspect: at long last they separated law and theology and accorded theology no place in international law. This enabled them to develop an interstate law that was acceptable to all states, notwithstanding their religious differences.

Ultimately Grotius became the most influential exponent of the budding international law. The result of his work was the emancipation of international law from theology.¹⁴⁵

Grotius' doctrine had a strong inclination towards rationalism. He believed in the existence of secular natural law principles that existed independently from religious truth. With his inherent rational qualities man could acquire actual knowledge of natural law.¹⁴⁶ Grotius represented the progressive post-Reformation intellectual climate with his doctrine that natural law could exist even without God, in spite of the fact that divine decrees and natural law coexist in harmony.¹⁴⁷ In this respect Grotius and his fellow jurists are in harmony with Bodin. Although Bodin did not accept natural law as the basis of his political philosophy, nor as the foundation of political order, he regarded a religiously impartial authority as the key to political order and social peace.¹⁴⁸ Their common characteristic was to be found in the fact that both discarded religion as a credible and

¹⁴² Hearnshaw (n 140 above) 143.

¹⁴³ Brierly (n 135 above) 25-40.

¹⁴⁴ Brierly (n 135 above).

¹⁴⁵ R Pound 'Theories of the Law' (1912-13) 22 *Yale Law Journal* 124.

¹⁴⁶ Barrie (n 134 above) 174.

¹⁴⁷ A du P Louw 'Hugo de Groot of Grotius (1583-1645)' in AM Faure *et al* (eds) *Die Westerse politieke tradisie* (1981) 204.

¹⁴⁸ Louw (n 147 above) 205.

workable political instrument for establishing order. Hobbes and Locke naturally also shared this common characteristic.

Grotius drew inspiration from the schism between theology and political philosophy, which had almost been carried into effect completely by the early seventeenth century and went hand in hand with the emancipation of natural law from theology.¹⁴⁹ Natural law had a rich Classical tradition and was secular in content which made it easy to apply in the heterogeneous world of the post-Reformation period. The Stoics, who had influenced Roman legal perceptions and whose thinking was reflected by Cicero, among others,¹⁵⁰ held the view that there is a universal law applicable to all mankind and which is accessible to every person simply by employing his rational abilities. This secular universal law was the necessary intellectual instrument employed by Grotius, Pufendorf and other exponents of the school of natural law to enable them to design an interstate law in a supra-national and religiously heterogeneous world. With the assistance of this new regulatory system of international law, it was – to employ the phraseology of Neville Figgis – finally possible for Grotius to tame Machiavelli (and unbridled power politics).¹⁵¹

The finer details of international law are of less importance in the present discussion. What is important, however, is that the territorial state has become the central entity in international law since the seventeenth century, just as it has also become the central theme in political philosophy and political practice. In this respect JL Brierly comments:

But as a definite branch of jurisprudence the system which we now know as international law is modern, dating only from the sixteenth and the seventeenth centuries, for its special character has been determined by that of the modern European state system, which was itself shaped in the ferment of the renaissance and the reformation.¹⁵²

After Bodin, Hobbes, Locke and Grotius the state determines the boundaries of large parts of our intellectual labours. The need for the undisturbed preservation of the state necessitates a strict directive as to how various scientific disciplines are to be practised. The territorial state therefore has an epistemological effect, because it has become a codeterminant of what constitutes relevant and valid scientific practice in certain disciplines, and what does not. In this

¹⁴⁹ Sabine (n 47 above) 415 *et seq.*

¹⁵⁰ See in general Sabine (n 47 above) 159-173.

¹⁵¹ Figgis (n 31 above) 246. In light of the unparalleled intolerance and cruelty of the religious wars, it is more accurate to state that Grotius did not in fact tame Machiavelli as such, but rather the pope and Jean Calvin. The gory consequences of the actions of these spiritual leaders were much more horrible than the worldly Machiavelli could have imagined.

¹⁵² Brierly (n 135 above) 1.

respect the territorial state functions as a determinant of paradigms. Since then the state has also been determining individual identity, just as the *Repubblica Christiana* had done before. Individual identity is being enforced and adapted in conformity with what the state requires. After the founders of statism had completed their work, all of us have become servants of the mortal god – the state.

The ingredients of the statist paradigm will be unravelled in chapter 5. In chapters 6, 7, 8 and 9 the emphasis will shift to scientific practice in terms of the disciplines of the statist paradigm and in accordance with the claims to conform with the statist identity.

CHAPTER 5

THE STATIST PARADIGM

1 The main markers of the statist paradigm

The advent of the territorial state as the dominant political entity was sketched in chapter 3. In chapter 4, the foundational theory concerning the new territorial state was discussed, with the emphasis on *inter alia* the essential characteristics of the territorial state – in other words, what the fundamental requirements for the existence of the (territorial) state entail. These characteristics and requirements are embodied in the definition of the state, a definition that is generally accepted in all scientific disciplines in which the state may somehow be under discussion, particularly in legal and political scholarship. The definition of the state enjoys the same general popular recognition in normal daily political discourse.

A definition such as the definition of the state, which requires certain things to be fundamental for the existence of the state, is, however, not merely of importance on account of the requirements it poses. It is equally important on account of those things that are not required as essential characteristics for the existence of the state – in other words, those things that it keeps quiet about. By actually not requiring certain things and not giving them a role in the definition of the state, such excluded things are declared irrelevant when reflecting about the state. Therefore, nothing needs to be said about such things or, if something is to be said about these things, it is at least of such minor importance that it does not warrant any mention in the definition of the state.

This definition, the unanimous assignment of the essential characteristics and concomitant exclusion of certain themes as being irrelevant, has led to the current paradigm of scientific activity regarding the state. This means that a peremptory convention of relevant scientific activity has been created, in terms of which certain themes and opinions that do not conform to the existing convention are ruled out of order. In this chapter the content and operation of this convention – called the statist paradigm – will be scrutinised.

Although the state concept is differently emphasised according to the various disciplines in which it is dealt with, there is unanimity in respect of its definition and core characteristics.¹

Article 1 of the Montevideo Convention of 1933 on the Rights and Obligations of States, contains an internationally authoritative definition of the state that reflects the existing unanimity. It meets with universal approval and is generally applied. It reads as follows:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other States.

The universal acceptance of this definition is simply a result of the fact that the four characteristics mentioned above are internationally applied, in both the legal and political context, as the trite characteristics of statehood. The definition therefore purports to accomplish no more than a description of an existing state of affairs in a neutral and impartial way. In other words, the definition pretends to be free from any judgments of value or ideological and political preferences and prejudices. By all indications it is merely a descriptive version of a longstanding and well-established neutral reality. It is, however, far from neutral and impartial. In fact, it reflects and entrenches certain preferences and thus takes sides in a political and ideological way.

Admittedly, the definition of the state concept of the Montevideo Convention does not concern itself with (internal) constitutional law, but rather endeavours to cater for the needs of public international law. The crucial aspect of the question of statehood in terms of international law, is the question regarding the requirements that an entity has to meet in order to gain recognition as a legal subject for the purposes of participating in international relations.² The primary question around the definition of the state in terms of international law therefore turns on the legal subjectivity of the state.³ In accordance with this, DW Greig proposes the following definition:

... a state for the purposes of international law is a territorial unit, containing a stable population, under the authority of its own

¹ On the differing meanings of the concept of state, see LG Baxter 'The State and other basic terms in public law' (1982) 99 *SALJ* 212 *et seq.*

² DW Greig *International Law* (1976) 93.

³ In addition to the fact that they are in agreement as to the requirements of the Montevideo Convention, what all works on international law thus also have in common is that they continuously place emphasis on the legal personality of the state. See for example MA Dixon *Textbook on International Law* (1990) 53-59; P Malanczuk *Akehurst's Modern Introduction to International Law* (1997) 75-81; I Brownlie *Principles of International Law* (1979) 60 *et seq.*; JG Starke *Introduction to International Law* (1989) 96; H Booysen *Volkereg en sy verhouding tot die Suid-Afrikaanse reg* (1989) 120 *et seq.*

government, and recognized as being capable of entering into relations with other entities with international personality.⁴

Even in constitutional law, one finds definitions of the state concept that emphasise the state's legal personality for the purposes of international relations.⁵ Although Oppenheim writes about international law, and not necessarily about constitutional law, he emphasises sovereignty as the distinctive characteristic of statehood when he defines the state as follows:

A State proper – in contradiction to colonies – is in existence when the people is settled in a country under its own sovereign Government.⁶

In constitutional law, the definition of the state also amounts to a description of the state in terms of the stereotypical state characteristics of territory, permanent population, a government that administers a legal order to which the entire population is subject and a certain minimum degree of political independence (in the absence of full sovereignty).⁷ It is widely known that political science also views the state in terms of the same law-inspired definition.⁸ These few references to definitions, among numerous similar definitions, are symptomatic of a universal unanimity in legal theory, political science and daily practice on what the state essentially does and does not entail.

The repetition of what is fundamentally the same definition of the state, by prominent scientists in a variety of subjects, is significant for two reasons, namely to indicate what the definition does in fact say, as well as what it omits to say.

What is repeatedly emphasised in the definitions, is that the state is an entity with a specific *legal* nature.⁹ This is eminently proven by the emphasis, in terms of international law, of the state as a legal person, as well as the emphasis that constitutional law places on the fact that the state is clothed with the legally laden concept of sovereignty. It also gains prominence in what can be described as the legally functional definition of the state, in terms of what the state

⁴ Greig (n 2 above) 93.

⁵ For example M Wiechers *Verloren van Themaat Staatsreg* (1981) 6, 7.

⁶ L Oppenheim *International Law: A Treatise* (ed A Lauterpacht) Vol I Tenth impression (1974) para 64 118.

⁷ See for example G Carpenter *Introduction to South African Constitutional Law* (1987) 5; DA Basson & HP Viljoen *Suid-Afrikaanse Staatsreg* (1988) 19-22; O Hood-Phillips & P Jenkins *Constitutional and Administrative Law* (1987) 4-5. This is standard and a large number of other works can also be referred to on this topic.

⁸ See for example J Frankel *International Relations* (1969) 8; Q Wright *The study of international relations* (1955) 4; RN Gilchrist *Principles of Political Science* (1952) 7.

⁹ HJ Laski *An Introduction to Politics* (1951) 13; D Held *et al* (eds) *States and Societies* (1985) 1.

should accomplish. Harold Laski supports such definition. He declares the state to be a means by which human conduct is regulated¹⁰ and therefore describes the state as:

... a society of individuals submitted if necessary, by compulsion, to a certain way of life.¹¹

According to this definition, the state's legal function of maintaining order is aimed at regulating the mutual conflict that exists amongst interest groups, by way of the positive law:

The state seeks to direct the struggle of the interests groups into the channels of the positive law.¹²

Hans Kelsen approaches the question of the state from the angle of his well-known (positivistic) pure legal theory. According to this theory, legal concepts must be explained exclusively in terms of the law. Kelsen therefore argues that only the positive law can qualify as the raw material from which legal theory can be construed. He regards any extralegal considerations, like moral judgments, political theorising, considerations of variable power relationships, etc (which are, for example, of great interest to sociological jurisprudence or in legal realism), as irrelevant for the purposes of legal research and consequently rules such considerations out of order.¹³ In conformity with this approach, he makes a point in his pure legal theory to identify and analyse the generally accepted formal essentials of the phenomenon of law.

The result of this was that he identified the concept of *norm* as the fundamental characteristic of law. Norms are the distinctive and essential characteristic of law. Norms are, however, integral elements of a dynamic whole, in the sense that all norms obtain their validity from a higher and more general norm, and ultimately from the most general and fundamental norm — the ground norm (*Grundnorm*). The total legal order of a specific state owes its legitimacy to this norm.¹⁴ (The constitution of a state is usually the *Grundnorm* that applies in a specific state.)¹⁵ To Kelsen's mind the

¹⁰ Laski (n 9 above) 11.

¹¹ Laski (n 9 above) 13.

¹² Thus CJ Friedrich *Man and his Government: An empirical Theory of Politics* (1963) 550, in response to the ideas of Gustav Ratzenhofer.

¹³ For a brief summary of Kelsen's pure legal theory, see H Kelsen 'The pure theory of law and analytical jurisprudence' (1942) 55 *Harvard Law Review* 44 *et seq.* With reference to his own pure legal theory, he declares for example: 'It is called "pure" because it seeks to preclude from the cognition of positive law all elements foreign thereto.'

¹⁴ Kelsen (n 13 above) 63.

¹⁵ It does, however, not necessarily have to be the constitution. See AE van Blerk *Jurisprudence: An Introduction* (1996) 48 49, 52.

state, with its constitution as the most general norm, is nothing less than a legal order:

One of the distinctive features of the pure theory of law is its recognition that the coercive order which constitutes the political community we call the state, is a legal order. What is usually called the legal order of the state, or the legal order set up by the state, is the state itself.¹⁶

In Kelsen's theory there is no difference between state and law:

But if it be recognized that the state is by its very nature an ordering of human behavior, that the essential characteristic of this order, coercion, is at the same time the essential element of the law, this traditional dualism (between law and state) can no longer be maintained.¹⁷

What is just as important as the fact that the state represents, in the first instance, a legal order, is the fact that the state is essentially and above all a place.¹⁸ All the requirements for statehood are, in one sense or another, geographical in nature.¹⁹ It is therefore quite correct to maintain that territory is such a central component of the state that it is often fully equated to (identified with) the state. In this respect TW Bennet remarked:

Gebied is so 'n belangrike bestanddeel van staatskap dat dit in die algemene gebruik dikwels as metonimie vir staat gebruik word, dit wil sê gebied is staat.²⁰

A state's territory is much more intimately related to the concept of state than the citizenship of individuals are entwined with the state. Any conduct, of whatever slight nature, which may affect a state's territory, like an external military attack or violation of its borders, or an internally motivated attempt to secession, will naturally be regarded as an attack on the state itself. In contrast, conduct that harms individual citizens of a state will not necessarily be viewed as an attack on the state itself.

From this discussion one can conclude that *territorial integrity* and *national sovereignty* – namely the *territorial* and *legal* elements – are the two fundamental characteristics of statehood. Bennet again

¹⁶ Kelsen (n 13 above) 64.

¹⁷ Kelsen (n 13 above) 65.

¹⁸ MI Glassner *et al Systematic Political Geography* (1980) 43.

¹⁹ Glassner (n 18 above) 43.

²⁰ 'Territory is such an important component of statehood that it is often used as a metonymy for state in general usage, that is to say, territory is state.' TW Bennet 'Elemente van die Staat' in M Wiechers & F Bredenkamp *Die Staat: Teorie en Praktyk* (1996) 73.

correctly states that, in terms of the classic rules of international law, the concept of state is essentially a representation of a territory.²¹

In contrast to the central role of territory in the concept of state, population – in particular the nature and composition of the population – is mainly irrelevant. At best, it takes a weak second position. There is no requirement that the population of a state should have mutual ties in respect of culture, language, religion or the like. The only requirement with regard to population is that it has to be relatively permanent. It is, however, not required that the population should already have been a nation before, which implies close social ties and mutual association. For the very reason that territory is of such cardinal importance in comparison with population, which plays a minor role, it is obviously inappropriate – as often happens – to refer to the state as the nation (or national) state. This is one of the reasons why the concept of *territorial state* clearly qualifies as a more fitting descriptive term. Population is indeed relevant for the requirement that the inhabitants of the state must adapt themselves to conserve the territorial integrity of the state. In this respect, the inferior role of the state population in contrast with the state territory emerges again, for it is the population that has to answer to the requirements of the territory, not the other way around. (This aspect is discussed at length in chapter 6.)

The similar definitions of the state favoured by authors on international and constitutional law and political science, as well as Kelsen's description of the state as essentially being a legal order above everything else, point to the fact that the state is regarded, above all, as a *legal* phenomenon of a territorial nature. That is exactly what the definitions proclaim. This implies that social and anthropological questions like the nature of the state population will never arise. The definitions rule such questions out of order.

The view that the state is a legal subject cannot be faulted; neither can the description of the state as a legal order within certain territorial borders. However, it is also obvious that this is not all that the state entails – not from the angle of political theory, nor from the angle of legal scholarship.

In addition, one can ask whether the state borders that were determined at a certain stage due to historical circumstances, should in fact be where they were drawn and, considering its cultural and linguistic heterogeneity, whether the state population should actually inhabit the same state (territorial legal order). Would it not be

²¹ Bennet (n 20 above) 73.

eminently more fitting, even peremptory, for states to be fragmented in order to align the legal order with the realities of language and culture? Isn't it perhaps true that, due to the arbitrary way in which their borders were historically determined, many states are in fact functioning on the basis of a permanent undemocratic domination of a minority by a majority? Furthermore, should such a state not preferably be transformed to bring an end to this unsatisfactory state of affairs? In the era of colonialism, borders were arbitrarily determined according to the fancies and preferences of the colonial powers and in conformity with power relations at the time. The interests and preferences of the African population played no part at all during this process. In the process of determining borders the ethnic composition of the indigenous populations was not heeded at all. Accordingly, artificial states were created to accord with the wishes and preferences of the colonial powers and often on account of fierce political competition among them.²² The colonially determined borders constitute a permanent colonial blemish, perpetually confronting us long after the formal conclusion of colonialism. Should these colonially inspired borders be maintained or should local realities be challenged with a view to reconsidering this colonial legacy? A variety of disciplines can be involved in answering these questions.

The need to pose these types of questions is emphasised by the fact that borders, as just mentioned, were not determined on the basis of some balanced process of democratic consultation. If there is one thing that is, above all things, a legacy of arbitrary and flagrant undemocratic tyranny, it is to be found in the determination of state borders – especially the borders of the erstwhile colonial world, particularly in Africa.²³ Therefore, it would appear quite strange that this undemocratic legacy is cherished with such a high measure of sympathy. State borders were not drawn on the basis of free political association. The British historian, JM Roberts, explains this for example, by referring to Western Europe during the sixteenth and seventeenth centuries:

Boundaries (which were often imprecisely drawn) continually changed as this or that portion of an inheritance passed from one ruler to another. The inhabitants had no more say in the matter than the peasants of a farm which changed hands.²⁴

A great number of those borders imposed from above to suit the desires, wishes and power relationships of, and among dynasties or in

²² Makau wa Mutua 'Why redraw the map of Africa: A moral and legal inquiry' (1995) 16 *Michigan Journal of International Law* 1113-1176.

²³ Makau wa Mutua (n 22 above). On this topic, also see the detailed discussion of I Brownlie *African Boundaries: a legal and diplomatic encyclopaedia* (1979).

²⁴ JM Roberts (1996) *The Penguin history of Europe* Penguin Books 287.

conformity with the preferences and needs of the colonial powers, created political entities that continue to exist in unchanged form to this day. The European political map was drawn mainly in consequence of the wars among absolutistic rulers.²⁵ The demographic reality and different views of the populations barely had any role to play in this process.

Judging by the fact that the negotiations that culminated in the formation of the Union of South Africa in 1910 had passed smoothly,²⁶ the South African state apparently came into being in a peaceful manner and without any snags. However, the unification of South Africa took place as a result of the British imperial strategy aimed at preventing the continued existence of the Boer Republics, which culminated in the Anglo-Boer War of 1899-1902, with calamitous consequences for the Afrikaners. The South African state is indeed a construction of Lord Alfred Milner, British High Commissioner in South Africa, which was only possible after the gruesome subjugation of the Boer Republics had been accomplished.²⁷

When one takes a glance at history, there is indeed a real need to pose the aforementioned questions. Any avoidance of these questions is based on the argument that such questions would involve nonlegal (and thus irrelevant) issues in the legal discourse. Inasmuch as issues of this nature could possibly crop up, they would belong to the fields of history, political science, sociology, philosophy or mere daily politics, and not to law and legal scholarship. Law (pure law, according to Kelsen) cannot concern itself with such issues, because they cannot be regarded as relevant material for the purpose of the legal discourse. This train of thought goes hand in hand with the scientific claim that the law-inspired definitions of the state, discussed earlier, reflects *pure*, *neutral* and *unbiased* law and that the definitions have thus not been contaminated by extralegal political/ideological preferences and prejudices or partiality.

Any such claim to a politically impartial and ideologically neutral scientific approach is false, however. Here we are confronted by a typical case of legal positivism trying to conceal its ideological preferences and partiality under the proverbial fig leaf, by pretending that it employs only *neutral facts*.

In all of these definitions of the state one will find a reflection of the statist theory of Hobbes and in particular, of Locke. These

²⁵ J Anderson and S Hall 'Absolutism and Other Ancestors' in J Anderson (ed) *The rise of the modern state* (1986) 31.

²⁶ FCJ Muller et al *500 Jaar Suid-Afrikaanse Geskiedenis* (1985) 380-385.

²⁷ Muller (n 26 above) 312-333; H Giliomee & L Schlemmer *From Apartheid to Nation Building* (1993) 13.

definitions are continuously modelled on an atomistic-liberal foundation and lean in a strong anticommunitarian direction. The preferences inherent in the definitions of the state are concealed, but sometimes they glimmer through.

In his commentary on a permanent population as one of the components of a state, Oppenheim remarks:

There must, first, be a people. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.²⁸

The similarity of Frankel's definition of population appears from the following:

The people are an aggregate of persons of both sexes living in a community which needs not to be homogeneous.²⁹

According to Gilchrist, a population is a

... number of people living in a definite territory ...³⁰

The quoted examples of the way in which the population component of the definition of the state is approached, represent the stereotypical way in which this aspect of the definition of the state is being handled. It is continually reiterated that no mutual ties of language, ethnicity, religion, culture or any other communal ties are required. The only requirement is that there must be a number of people (*an aggregate of people*) and that the number of people should be present within a defined territory. That is all.

Indeed, in this context only a number of people is set as a requirement, but – and that is the crux of the matter – this is no neutral and politically unbiased scientific fact. On the contrary, such definition is the manifestation in constitutional law of the Hobbesian and Lockean perception of the state. In terms thereof the state is a mere conflict-regulating institution, regulating the private needs and interests of atomistic individuals who are not mutually connected in any way. Furthermore, the state is obliged to act as a referee in resolving disputes caused by the clashing of interests that arise among mutually detached individuals, by employing the positive law. The current definition of the state, in terms of which the state is represented as a legal order obtaining within a defined territory among a number of disconnected individuals, echo the ideas of

²⁸ Oppenheim (n 6 above) par 64 118 (own emphasis).

²⁹ Frankel (n 8 above) 8 (own emphasis).

³⁰ Gilchrist (n 4 above) 17; (own emphasis); also see Wiechers & Bredenkamp (n 20 above) 98.

Hobbes and Locke in, among others, the following fundamental respects:

- The state is a legal order.
- The state population comprises detached, indifferent individuals who fail to constitute a real community due to a lack of mutual ties.
- The state is not a *res publica* — a common object comprising all citizens with close mutual ties — but, as a simple means to regulate conflict, it has to facilitate and promote the attainment of private goals that are often in conflict.

Of course, this perception of the state is not the only one. This perception of the state is therefore not as scientifically neutral as it would appear; on the contrary, it is in fact politico-ideologically biased. The claim that the definitions of state discussed above constitute a purely neutral (positivistic) description is therefore baseless. In these definitions one is confronted by an ideological product, communicating with us by employing the misleading rhetoric of neutral science.

Characteristic of modern political theory (and also of legal scholarship, as is evident from the definitions of the state quoted above) is the trend, according to Larry Siedentop's correct observation,³¹ of handling a controversial concept like the state as if it were a concept totally devoid of any problems and controversy. The state is approached as a neutral concept of political and legal science, without any indication whatsoever that it might be politically loaded. Due to the fact that ideologically loaded concepts are concealed under the guise of merely a descriptive reality, important ideological issues are simply excluded from the debate.

The state, just like the concept of sovereignty, is almost always explained in terms of descriptive legal terms, whereas potentially ideological issues are ruled out of order as being *irrelevant*. In this respect Siedentop declares:

... for the most part philosophical analyses of the concept of the state stopped there. Any remaining questions about the state are assigned to historical or sociological enquiry in general and to Marxism in particular.³²

The concept of state is automatically loaded with certain ideological preferences and partialities. Nevertheless, this concept is handled as

³¹ L Siedentop 'Political theory and ideology: The case of the state' in D Miller & L Siedentop (eds) *The Nature of Political Theory* (1983) 53.

³² Siedentop (n 31 above) 54.

if it were a mere descriptive and neutral concept. In this fashion, scientific research becomes the tool and mouthpiece of ideology.³³

With regard to scientific activity, in particular in the humanities, it should be noted that this kind of activity is value-bound or value-driven. This entails a close relationship between *reality* and *ideal*, or that there should be a close relationship between apparently value-free facts and *values*. Preferences and bias in respect of values should therefore be considered and reflected in the representation of reality.³⁴ Consequently, the assertion that the empirical sciences are divorced from values and are objective amounts to mere pretence. In reality, the empirical sciences are also imbued with preferences in respect of values. This apparently also includes the most empirically descriptive aspects, among others, the definition of the state, which is perceived as being divorced from value biases. Likewise, scientific methodology and techniques are not neutral at all. Methodology and techniques are laden with biased preferences and prejudices in respect of values and ideologies and in the teaching process, such ideological bias is also transferred to students.³⁵

Legal scholarship is particularly susceptible to the silent and unnoticed transfer of prejudices pertaining to values and ideologies. Legal scholarship constantly involves itself with institutional facts,³⁶ namely the facts of a certain social order. Furthermore – and this is of utmost importance – the material employed by lawyers and similar scholars in the humanities are always of an episodic and fragmented nature, instead of in the nature of a more encompassing totality.³⁷ statutes, regulations, judicial pronouncements etc. Consequently, the lawyer's attention is always occupied by the finer details. The fields that constitute the object of a lawyer's scrutiny all belong to a variation of other people's agendas: political parties, governments, pressure groups, private litigants, etc.³⁸ Lawyers serve these agendas and are virtually never in a position to set and promote their own agendas. They are forced to promote and justify biased private and political interests and are not really in a position to regard these

³³ Siedentop (n 31 above) 54-56.

³⁴ AM Faure *n Ondersoek na die Kenteoretiese Grondslae van die Vergelykende Politiek* (1981) Unpublished doctoral thesis, University of South Africa 66. Faure summarises the connection between facts and values by declaring: 'Om te ken is om te keur' (To know is to choose).

³⁵ SS Wolin 'Political theory as a vocation' (1969) 63 *American Political Science Review* 1063.

³⁶ N McCormick 'Reconstruction after deconstruction: A response to CLS' (1990) 10 *Oxford Journal of Legal Studies* 557.

³⁷ McCormick (n 36 above) 537.

³⁸ McCormick (n 36 above) 537.

interests objectively, nor to draw conclusions adverse to their professional briefs.³⁹

In legal work one is always confronted by an agenda of a person or institution on the one hand, or an agenda created by a specific order that has been established in terms of a constitution or legislation. On the other hand, there are jurists who are employed to pursue these agendas. At the most basic level one will find the agenda of a plaintiff, claiming an amount from a defendant, or the agenda of a defendant, defending himself against the claim, or the agenda of the prosecuting authority, trying to obtain a conviction of a suspected criminal, or of the accused who has to defend himself against the charge. At a more general level one will find the government's agenda to implement legislation in terms of an ideology or preference of interests, by means of which such preference will be settled as peremptory and apparently impartial legal rules. Additionally, there is the politically inspired agenda to draft a constitution, which in turn will serve interests and ideologically biased preferences and will oppose other interests by entrenching the former in legal instruments and obscuring the latter. In the broadest sense, the total legal order is evidently an agenda in itself. A legal order always represents the manifestation of some or other political consensus or, more often, some or other ideological domination or domination of interests. By means of legal instruments — constitutions, legislation, administrative action, judicial judgments, bodies, institutions, measures and powers created by legislation and the constitution — the legal order gives expression to that domination of interests, serves it and endeavours to protect it against change. As its servants, lawyers play a key role in its administration.

Lawyers must always be employed to assist with the implementation of these agendas. The lawyer then acts to fulfil the aims of the agendas and their authors. In the process, it often becomes necessary for the lawyer to translate the problem that confronts him and for which he has been briefed, from the nonlegal language in which the problem was first put to him, into legal parlance, to enable him to deal with the problem. By means of such translation a rhetorical schism develops between the initial agenda he was briefed for and the newly formulated agenda. (The problem to be confronted remains the same, but it has now been reformulated in terms that a lawyer can handle.) Thus the lawyer is also removed from the initial agenda that he was briefed for. Thereafter he will function in the new legally reformulated world. For example, he no longer concerns himself with John Smith who did not repair Jack Taylor's car

³⁹ HJ Berman *Law and Revolution: The formation of the Western Legal Tradition* (1983) 156, 157.

properly, but with the defendant who breached his contract with the plaintiff by way of inadequate performance. Furthermore, he does not concern himself with the acrimonious political argument regarding alleged racially motivated bullying that took place with the employment of a certain person, but with the neutral legal terminology of the Employment Equity Act, in which political bias and preferences seem to be playing no part. The lawyer involved in insolvency proceedings under the Insolvency Act also does not concern himself with maintaining a broad capitalistic order of which the Act is in reality a practical implication, but merely with the legally defined application of the Act itself. The lawyer involved in matters of constitutional law is likewise not interested in the fact that the constitution quite often constituted the embodiment of hegemonic and hierarchical politics. Such fact usually escapes his attention; on the contrary, it would seem that he is apparently purely involved in arguments concerning the correct application of the details of (constitutional) law. He would thus rarely pay a thought to the political background and power relationships maintained by means of the constitution, as well as the hegemony that it creates and entrenches. It has mainly been lost in memory.

Sometimes it is unnecessary to translate the agenda into legal parlance. When one operates within a legislative or constitutional framework, the ideology, politics and preferences and prejudices in terms of interests, which are served by the legislation or constitution, have already been transformed into legal terminology and concealed under a cover of neutral legal terms. The conflict of interests that was settled with the adoption of the constitution or legislation was already translated into legal parlance by such constitution or legislation. Henceforth the lawyer concerns himself with *legal material* and not with the *political choices* and preferences in terms of interests, which constitute the underlying motive for adopting the legislation or constitution in question. In such a case the lawyer strives to realise a political agenda, but because it has been translated into legal parlance, he is under the impression that he is serving the legal agenda – free from any contamination by politics or something similar, which falls beyond the legal field.

Certain agendas are clear and simple, like when the content of the agenda is to issue summons on behalf of a plaintiff. In other instances the broad agenda within which the lawyer operates stands so far in the background, he would hardly realise that he is rendering a service in aid of a specific agenda. When a lawyer concerns himself with a matter that requires performance in terms of the constitution or when he participates in the drafting of a constitution, he is in fact intimately involved in realising a political agenda. Such political agenda, however, lies concealed behind the legal discourse, giving rise to a situation where the lawyer does not realise that he is in fact

making himself available for carrying out another's political project. Furthermore, one should realise that legislation usually embodies some or other political, ideological or economic preference. However, due to the concealing neutrality of legal parlance,⁴⁰ such preference will never be betrayed. On the contrary: it will rather be covered up.

Legal activity — that with which the lawyer concerns himself — never entails the personal setting of the political agenda that the law should serve. On the contrary, it always concerns itself with the finer details in order to fulfil the agenda. When the agenda is quite simple in the sense of being clear and containing little detail, he is obviously aware of its existence. On the other hand, the agenda can be of a complex nature. It may contain broad and general aims that are largely divorced from the details dealing with the real and concrete implementation thereof. When one has to employ these finer details, such activity inevitably occupies the lawyer's attention, causing him to be ignorant of the fact that he is serving the accomplishment of another's project. The need to involve oneself with detail simply narrows down your horizons, to such an extent that one's involvement in and subservience to the greater project cannot be spotted and therefore also not be understood.

The broader and more general the agendas and projects of the persons and institutions within which the lawyer operates, the finer the details that are employed to fulfil the agenda, the stronger the urge will be to concentrate only on the detail and lose all sight of the agenda as such.

The fundamental value judgments and preferences, in respect of interests and ideology contained in the agenda, never catches the attention of the lawyer, simply by reason of the fact that the lawyer's attention is, as it were, occupied by the finer details of accomplishing the fulfilment of the agenda. The legal academic curriculum has also not been compiled to inform the (prospective) lawyer of the ideological universe of values within which legal activities take place, nor to sensitise him to the ideological preferences within which legal work takes place. On the contrary, legal training professes, and is based on the fact, that one becomes involved in authentic academic themes — true legal science (which is in fact no more than legal

⁴⁰ It is specifically for this reason, among others, that law is regarded as a useful resource for exercising authority. See for example AT Turk 'Law as a weapon in social conflict' (1976) 23 *Social Problems* 276 *et seq.*

dogma⁴¹ or doctrine). Peripheral themes that are ideologically inspired are separated from this and would therefore not be worthy of bearing the hallmark of *true* legal science.⁴² The suggestion that goes hand in hand with this is that *true* legal science is politically and ideologically neutral.⁴³

When we state that lawyers are responsible for executing and fulfilling the agendas and projects of others, we are indeed also asserting that legal *science* functions as an applied science. In contrast with 'pure' sciences, applied sciences can be distinguished by the fact that they stand in a more direct relationship with society – social reality.⁴⁴ This is especially true in the field of legal science, which is aimed precisely at regulating human conduct and regularly handling and adjudicating human conflict.

RF Beerling makes the informative assertion that science – applied science in particular – is derived from *practical and ideological systems*.⁴⁵ In view of the discussion of Bodin, Hobbes and Locke, who rendered a theoretical explanation of the aims of state formation and the functions of the modern state, and generally described the state as a geographically based legal order and mechanism for the regulation of conflict, this statement is on all fours with legal science. Legal science and constitutional law in particular, which those scholars laid the foundations for, also found its origin in practical situations. In this case the practical situation that confronted these scholars, was that of highly traumatic human conflict and the radical lack of real human community. The philosophical foundation of the state and constitutional law take human atomism and the anticomunitarian absence of human community as its point of departure. This absence of community was actually experienced during the prolonged conflicts of the sixteenth and seventeenth centuries. The philosophical foundation of constitutional law was, as it were, engendered by these conflicts and was notably aimed at finding a formula by means of which lasting and

⁴¹ Harold Berman (n 39 above) 154 explains that the modern legal scholar, just like his predecessor in twelfth-century Europe, concerns himself with legal dogma, i.e. the systematic, thorough investigation of all the implications of legal rules, their mutual relationships and their application in certain situations.

⁴² D Kennedy 'The political significance of the structure of the law school curriculum' (1983) 14 *Seton Hall Review* 1.

⁴³ Kennedy (n 42 above) 8-9 points out for example that it is argued that private law (for example the law of contracts) forms the focal point of true uncontaminated legal science. Kennedy avers that this focal point is also politically motivated. It represents capitalism and liberal individualism.

⁴⁴ RF Beerling *et al* *Inleiding tot de Wetenschapsteorie* (1970) 150.

⁴⁵ Beerling (n 44 above). The authors then add that the scientific claims of such an ideologically inspired science are not necessarily of a lesser value.

effective peace could be guaranteed, notwithstanding the lack of human community.⁴⁶

The crux of the solution accomplished by the intellectual efforts of these founders can be summarised in the concept of *statism*. It is in fact the state as a neutral legal order and regulator of conflicts, which constitutes the core element of the solution to the problem advanced by these *statist* philosophers. Such *statism* – the ideologically inspired dispute-resolving formula of the sixteenth and seventeenth centuries – has been built into modern constitutional and international law and political science, in the guise of the generally accepted definition of the state. Formulated differently, *statism* represents the *paradigm*⁴⁷ – the basic theory – in terms of which these disciplines, and in particular large parts of legal scholarship, are pursued.

The premises of the statist paradigm, which are the intellectual products of Bodin, Hobbes and Locke, are today still contained in the positivistic definition of the state. Such paradigmatic premises are ideologically inspired facts that supply the consensus framework for scientific activity in the fields of constitutional and international law, other legal disciplines as well as political science. Those basic facts of the paradigm not only establish the framework for scientific activity, but also censure attempted scientific action that tries to function beyond the assumptions that underlie the paradigm and reject it as being *unscientific*.

The statist paradigm contains the following four ideologically inspired basic facts or basic premises:

- The territorial state is the basic arrangement of political organisation. Territory is the point of departure. The other elements of the state are approached from that angle. From territory, one proceeds to population and not the other way round. Territory enjoys preference over population. The population element is handled in such a way that it has to adapt and conform to the element of territory, not the other way round. Territory is not a mere fact. On account of its preference in comparison to the other elements of the state, it is also an ideologically motivated judgment. (The matter will be dealt with in detail in chapter 6 when nation building or, more correctly, *state building* comes up for discussion. It will be touched upon

⁴⁶ In this respect Bodin, Hobbes, Locke and Grotius were also the founding fathers of constitutional law as an applied science, apart from being the founding political philosophers of the modern era. Beerling (n 44 above) 151 in fact proclaims that one of the characteristics of applied science is the fact that it is more focused on fulfilling practical aims than pure science.

⁴⁷ The concept is discussed in detail later on.

again in chapter 9.3 where territorial integrity and self-determination in international law are discussed.)

- The state accommodates a *population*, not a *community*. The population comprises any number of persons, regardless of the existence of any ties of language, culture, ethnicity, religion, descent or anything similar among them. Only two common factors are to be found among the individuals comprising the state population. These are that they are present in the same territory and subject to the same legal order. These are the fundamental elements of the state *community*. Although it has become relatively commonplace to loosely refer to nation(s), such reference is also not to a community bound by close mutual ties, but merely the aggregate of the state population, regardless of any presence or absence of mutual ties.
- The population is regarded as detached individuals who exist in a state of atomism aimed at pursuing private personal interests. In as much as individuals may be bound by ties of a linguistic, religious, ethnic, cultural or similar community, it would be a mere coincidence and is, in a legal and political sense, a totally irrelevant fact. Such groupings only have private significance and may never be viewed and accommodated as a public reality that can determine the nature of the state. In the public order — law and politics — only two entities are relevant: the individual and the state.⁴⁸ Due to the restriction of the above-mentioned groupings to the private domain, the state is neutral, or at least pretends to maintain group neutrality.
- The state functions as a legal order. It provides facilities for the fulfilment of private interests and guarantees efficient dispute resolution by means of a legal system. In this way it promotes private satisfaction of needs and at the same time guarantees the stability of the state. In order to fulfil this function, the state is sovereign, which means that it is the highest authority within its borders and has a monopoly to lawful force. It also strives to be the sole creator and dispenser of law. The creation of law and the administration of justice beyond formal state institutions can only occur if it is permitted by the state.

These points represent the four basic principles of statism, the four crucial premises of the statist paradigm. Its foundation was laid by Bodin, Hobbes and Locke and this basis still regulates the way in which we undertake major parts of our scientific projects in the legal

⁴⁸ Rights therefore exist on two levels only, namely the level of the individual and that of the state. The state is the sole collective entity in which rights vest. No other collective entity qualifies as such. Vernon Van Dyke 'Human Rights and the rights of groups' (1974) 18 *American Journal of Political Science* 726 formulates this as follows: 'The assumption was that rights exist at two levels, the level of the individual and the level of the nation state. Groups other than the nation or the population of the state could be ignored.'

and political fields, as well as the way in which we pursue science and politics.

2 The dynamics of paradigms

Thomas Kuhn is the scholar who first introduced and popularised the notion of *paradigm*.⁴⁹ His work made him an influential, if not the most influential, philosopher of science for a very long time. Kuhn is of importance to the present discussion *inter alia* since his ideas rebut the claims of neutrality accorded to scientific activity. By implication, Kuhn effects corrections to the products of positivism (which, among others, constitute the basis of Kelsen's work) by debunking the claims of neutrality in respect of values and ideology.⁵⁰

Kuhn's work in the field of the philosophy of science was primarily tuned to the physical sciences. In his theory he continuously employed verifying examples from the field of the natural sciences. His work, however, was also of great value to the social sciences and especially to legal scholarship.

Kuhn explains that science does not expand steadily. Periods of normal science alternate with phases of scientific revolutions, to be followed again by a new era of normal science. In the new era, scientific work is resumed according to a new paradigm that was victorious during the period of scientific revolution.

The paradigm concept therefore occupies centre stage in the process of understanding Kuhn's explanation of the development of science. A paradigm is:

universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners.⁵¹

⁴⁹ In 1962 Kuhn expounded his philosophy of science in his main work, TS Kuhn *The Structure of Scientific Revolutions* (1970). In this regard, see further: Faure (n 34 above) 69-73; SS Wolin 'Paradigms and political theories' in P King & BC Parekh (eds) *Politics and experience: Essays presented to professor Michael Oakeshott on the occasion of his retirement* (1968) 125-152; J Mouton 'Thomas S Kuhn' in S Snyman (ed) *Wetenskapsbeelde in die Geesteswetenskappe* (1995) 65-92; PhJ Thomas 'Wetenskapsfilosofie in die regs wetenskap' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 38.

⁵⁰ Mouton (n 48 above) 88; (a) Hans-Georg Gadamer's work as contained *inter alia* in: H-G Gadamer, *Truth and method* (translated by J Weinsheimer and DG Marshall) (1989) 267-377; (b) H-G Gadamer 'Truth in the human sciences' (translated by BR Wachterhauser) in BR Wachterhauser (ed) *Hermeneutics and truth* (1994) 25-32. (c) H-G Gadamer 'What is truth?' (translated by BR Wachterhauser) in BR Wachterhauser (ed) *Hermeneutics and truth* 33-46 is closely associated with this, as he connects the concept of truth in human sciences with interpretation by interpretive communities in terms of basic convictions shared by dominant interpretive communities. As such, truth in the human sciences is cultural in nature.

⁵¹ Kuhn (n 49 above) viii.

A paradigm establishes a coherent *tradition* of scientific research⁵² and as such creates the basis for a period of scientific activity. There is an important sociological component inherent in the paradigm concept, as it determines the rules to be observed by those involved in specific scientific activity, in order to be scientifically relevant.⁵³ By referring to the natural sciences Kuhn declares that the rules that constitute the paradigm also include quasi-metaphysical rules. They are of a metaphysical nature because they prescribe to scientists which entities are susceptible to scientific research and also set the rules that govern the way in which realities should be disclosed.⁵⁴

In connection with this, Sheldon Wolin explains the sociological impact of paradigms. A paradigm

... is a community based on an agreement which extends not only to the rules governing inquiry and to the stipulations concerning what shall qualify as a scientific question and count as a scientific answer, but it extends as well to the particular theory which is accepted as true by the members in their research and investigation...From a sociological viewpoint, a paradigm provides a consensual basis which consolidates the loyalties and commitments of the members.⁵⁵

In this respect Kuhn offers the following comment: 'A paradigm governs in the first instance not a subject matter but a group of practitioners'.⁵⁶ To this he adds that scientists share a discipline matrix.⁵⁷ These ideas expressed by Kuhn tally with the work of scholars like Hans Georg Gadamer and Stanley Fish, who developed similar ideas with specific reference to the human sciences. In the humanities, truth is also determined by tradition; it is ascertained by a dominant interpretative community, who determines conventions of proper interpretation. Such community consequently determines what constitutes truth in the humanities, including legal science, in conformity with the rules of interpretation of the specific community involved.⁵⁸

Normal science that is based on and guided by a paradigm can thus be regarded as a form of scientific dogmatism and tyranny.⁵⁹ For that

⁵² Kuhn (n 49 above) 10.

⁵³ This point was thoroughly investigated in respect of interpretive communities, particularly in the humanities, by Stanley Fish *Is There a text in this class? The authority of Interpretive communities* (1980) 307-355.

⁵⁴ Kuhn (n 49 above) 41.

⁵⁵ Wolin (n 49 above) 132.

⁵⁶ Kuhn (n 49 above) 180.

⁵⁷ Kuhn (n 49 above) 182: 'Disciplinary because it refers to the common possession of the practitioner of a particular field; matrix because it is composed of ordered elements of various sorts each requiring further specialization.'

⁵⁸ See for example Fish (n 53 above) 307-355; Gadamer (n 50b above) 25-32.

⁵⁹ Faure (n 34 above) 72. See further Fish (n 53 above) 307-355.

reason Kuhn declares scientific textbooks to be not only descriptive, but also prescriptive and pedagogical. The textbooks reflect the paradigm that was victorious during the preceding revolution:

... a concept of science drawn from them (from the textbooks) is no more likely to fit the enterprise that produced them than an image of a national culture drawn from a tourist brochure or a language text.⁶⁰

The numerous textbooks in which essentially the same definition of state appears and which reflect and serve the statist paradigm, persuade their student readers on a daily basis to accept the notions and values contained in those definitions. However, in the context of legal scholarship (and other human sciences) we are not just involved with persuasion aimed at the acceptance of certain values, but also with ideological persuasion. Ideology always endeavours to incite people to political action, whether as a conservative ideology bent on maintaining the present order or as a revolutionary ideology aimed at the transformation of the present order:

Ideology is a practice-directed system of ideas on the basis of which political action may be understood or judged.⁶¹

The textbooks referred to are therefore of an ideologically conservative nature, as they endeavour to persuade their readers to defend and maintain the reigning statist order.

Normal science that is paradigm based, is a strict and dedicated attempt to understand, and if need be, enforce reality⁶² according to the conceptual framework supplied by the paradigm itself.⁶³ Normal science comprises the undertaking of research, based on one or several previous scientific achievements that are regarded as such by a certain academic community.⁶⁴

In the present instance the achievements are the politico-theoretical and legal notions developed by Bodin, Hobbes, Locke and Grotius that have, among others, been absorbed into the definition of the state.

This may prompt the following question: if a paradigm comprises work that has already been completed and is by nature an achievement already attained, what meaningful work then remains to be undertaken by scientists operating within the paradigm? Kuhn's

⁶⁰ Kuhn (n 49 above) 1.

⁶¹ JJ Degenaar 'Nationalism' in DJ van Vuuren & DJ Kriek (eds) *Political Alternatives for Southern Africa: Principles and Perspectives* (1983) 69.

⁶² In the context of the natural sciences, Kuhn does not refer to reality, but to nature.

⁶³ Kuhn (n 49 above) 5.

⁶⁴ Kuhn (n 49 above) 10.

answer to this would appeal especially to lawyers, when he asserts that work continued within the paradigm is reminiscent of the acceptance of – and conduct in conformity with – a court judgment delivered in a common law jurisdiction. (In the common law jurisdictions the *stare decisis* system is accepted, in terms of which courts are bound to follow the judgments delivered in earlier cases.) This is similar to a paradigm in the sense that the activities that follow upon the establishment of a paradigm, just like the activities that follow upon a binding court judgment, are not aimed at changing the paradigm, but only at its further articulation, refinement and specification.⁶⁵ Normal science therefore aims at the actualisation of the promises inherent in the paradigm, which means the detailed development and application of the potential implications of the paradigm.⁶⁶ Most academics spend their professional energy on this ‘mop up’, as Kuhn describes it. Such normal science mainly subsists in the fact that the scientists within a specific scientific field, force the material that they employ into the straitjacket or box created by the assumptions underlying the paradigm. In this regard Kuhn remarks as follows:

Clearly examined, ... that enterprise seems to force nature into the preformed and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all. Nor do scientists normally aim to invent new theories and they are often intolerant of those invented by others. Instead, normal scientific research is directed to the articulation of those phenomena that the paradigm already supplies.⁶⁷

The advantage of scientific research in terms of *normal science* is that, due to its restricted and concentrated focus, such research can succeed in producing a detailed research outcome which would otherwise have been impossible to achieve.⁶⁸ In normal scientific activity, the focus also shifts to the *manner* in which scientific activity is conducted. The outcome may be familiar, but the way in which it is achieved can be made elegant and refined.⁶⁹

The most striking characteristic, and at the same time the greatest disadvantage, of normal scientific research is in the extremely limited extent to which it is aimed at surveying new fields.⁷⁰

⁶⁵ Kuhn (n 49 above) 10.

⁶⁶ Kuhn (n 49 above) 24.

⁶⁷ Kuhn (n 49 above) 24.

⁶⁸ Kuhn (n 49 above) 24.

⁶⁹ Kuhn (n 49 above) 35-36.

⁷⁰ Kuhn (n 49 above) 35.

It is abundantly clear that the only problems that are regarded to be susceptible to scientific research, lie in the field of the further refinement and application of the reigning paradigm. Those involved in scientific activity are also encouraged to occupy themselves with these problems.⁷¹ Kuhn remarks:

Other problems, including many that had previously been standard, are rejected as metaphysical, as the concern of another discipline, or sometimes as just too problematic to be worth the time.⁷²

Where science should endeavour to acquire new knowledge and insight, one comes to realise that the faithful pursuit of the reigning paradigm often actually achieves the very opposite: academic intolerance, tyranny and finally a total blockage of knowledge and insight. A paradigm thus functions like an ideology because it determines the school of thought and the drift of the scientific work of those involved in the science at hand. Kuhn also refers to this blockage of insight when he comments as follows:

A paradigm can for that matter, even insulate the community from those socially important problems that are not reducible to the puzzle form,⁷³ because they cannot be stated in terms of the conceptual and instrumental tools the paradigm supplies.⁷⁴

The refinement of a paradigm leads to professionalism, the development of esoteric terminology, a serious restriction of the scientist's vision, as well as resistance to any paradigm change.⁷⁵

Because of the fact that the scholars involved in scientific activity are occupied with the finer details of the relevant paradigm, they often lose sight of the premises that underlie the paradigm. It occurs regularly that scientists do not even realise that they are in fact serving a certain paradigm (accompanied by a full load of values and ideology):

Though many scientists talk easily and well about the particular individual hypotheses that underlie a concrete piece of current research, they are little better than laymen at characterizing the established bases of their field, its legitimate problems and methods.⁷⁶

⁷¹ Kuhn (n 49 above) 37.

⁷² Kuhn (n 49 above) 37.

⁷³ 'Puzzle solving' means to find an answer that is already known by employing a variety of other methods. According to Kuhn (n 49 above) 35-36 this is the most typical activity of normal science.

⁷⁴ Kuhn (n 49 above) 37.

⁷⁵ Kuhn (n 49 above) 64.

⁷⁶ Kuhn (n 49 above) 47.

Although the scientist may regard himself to be operating in an objective and independent way, he is ultimately the unsuspecting repeater of dogma and the refiner and completer of ideology.⁷⁷

New materials confronting the scientist – new discoveries⁷⁸ and new theories⁷⁹ – reveal that the reigning paradigm is permeated by anomalies. In other words, it becomes clear that the reigning normal science is not equal to the task of handling and explaining novelties. New discoveries and theories, provided they are minor, can be accommodated in the existing paradigm by means of gradual adaptations.

The inability of normal science to accommodate new materials in the known paradigm, often leads to declared professional insecurity⁸⁰ and plunges the reigning paradigm and its adherents into a scientific crisis. As long as a new alternative theoretical framework has not been developed to enable the new materials that caused the crisis to be handled, one will encounter the strange situation where those involved in normal scientific activity do not react to the crisis at all. Due to its momentum, the reigning paradigm simply continues to exist, notwithstanding its proven inability to handle new theories and discoveries. Those scholars involved in normal science, who marched along in single file with the old paradigm, also proceed in the same old vein, despite the fact that the old paradigm is unable to set a reliable pace any more.

For as long as a replacement for the existing paradigm has not yet entered the scene, the existing paradigm is simply embraced, irrespective of the seriousness of the crisis to which it is exposed. In these circumstances, scientists try to alleviate the problems of the existing paradigm through crisis management.

They will devise numerous articulations and ad hoc modifications of their theory in order to eliminate any apparent conflict.⁸¹

⁷⁷ Basson & Viljoen (n 7 above) 1-4 claimed to have their own value-orientated and not positivistic scientific approach towards constitutional law. In the first place the two approaches are of course, not opposites, because positivism is heavily burdened by its own values. Secondly, the values referred to by these authors do not take them beyond expressing critical comments against the erstwhile apartheid system previously in place in South Africa. The rest of their work is a typical exercise in conservative normal science. One gets no indication of any realisation on their part – let alone discomfort or criticism – that they are faithful servants of the statist paradigm.

⁷⁸ Kuhn discusses the phenomenon of new scientific discoveries in great detail. He points out that they are not made instantly and that there is a resistance against new discoveries, because they cannot be controlled by the known paradigm. See Kuhn (n 49 above) 53-55.

⁷⁹ Kuhn (n 49 above) 66.

⁸⁰ Kuhn (n 49 above) 67-68.

⁸¹ Kuhn (n 49 above) 78.

The reason why this occurs is that scientific research without the premises that underlie a paradigm is impossible. In the absence of a new paradigm, it is therefore inevitable that the old paradigm must be maintained, no matter how insufficient it may be.

When a basic theory has attained the status of a paradigm, it will only forfeit its status when a replacement becomes available. Kuhn avers that a decision to reject one paradigm always goes hand in hand with the acceptance of a new one: 'The decision to reject one paradigm is always simultaneously the decision to accept another.'⁸²

Of course not all anomalies, inconsistencies and a paradigm's inability to handle situations will cause paradigm crises. However, once an anomaly is experienced as not being one of the issues of normal science, but as an issue – a riddle – that cannot be handled in accordance with the assumptions of the reigning paradigm, a crisis is at hand and a process of extraordinary science commences. It is then generally admitted that an anomaly exists and the leading scientists of the relevant scientific field will henceforth pay more attention to the problem. Solving the anomaly may even become the main theme of the science in question.⁸³

When a new paradigm has established its position, it causes the substratum – the raw materials – of the specific scientific field in question to become reconstructed and be regarded as totally new. It also has the effect that the most elementary theoretical generalisations, concepts and applications of some of the scientific disciplines involved are subjected to radical change. When the paradigm change has been completed, the profession will have completely changed its views in respect of the field, the methods and the aims of their science. NR Hanson maintains that the establishment of a new paradigm causes:

... the handling of the same bundle of data as before, but placing them in a new system of relations with one another by giving them a different framework.⁸⁴

The victory attained by the new paradigm points to the conclusion of a scientific revolution. Such revolution entails a noncumulative moment of development during which an old paradigm is completely replaced by a new one.⁸⁵ Kuhn defends his use of the political metaphor of revolution in the present context by illustrating the similarity between a scientific and a political revolution. In both

⁸² Kuhn (n 49 above) 77.

⁸³ Kuhn (n 49 above) 82-83.

⁸⁴ NR Hanson *Patterns of Discovery* (1983) quoted by Kuhn (n 49 above) 82.

⁸⁵ Kuhn (n 49 above) 92.

cases, existing institutions try to resist change and the advent of a new situation. The success of the revolution is therefore dependent on the dismantling of a number of malfunctioning institutions and their replacement by new ones.⁸⁶ The political metaphor is also apt, due to the fact that the scientific community is divided into two parties with regard to loyalty towards the old paradigm and the new aspirant paradigm respectively.

To my mind, however, the most relevant reason for describing a scientific overturn as a revolution is the fact that the change that has occurred took place beyond the rules of the 'constitution' of the existing paradigm. Kuhn very aptly reminds us:

Political revolutions aim to change political institutions in ways that those institutions themselves prohibit.⁸⁷

A new paradigm introduces new relevant scientific problems and determines that others, which were previously relevant, have now lapsed.⁸⁸ Debates on paradigms also deal with identifying the relevant problems that need to be resolved. It is a question of values that can only be answered in conformity with extrascientific preferences and judgments.⁸⁹

A scientific revolution causes the scientist to see the world in a different light and for the scales to fall from his eyes. He sees the light for the first time.⁹⁰

The success of a scientific revolution is mainly determined by a small amount of revolutionary scientists, intensely concentrating on the factors that caused the crisis in the existing paradigm. These scientists are often also novices and so young in the discipline at hand that they are not yet bound so strictly by the rules of the existing paradigm.⁹¹

Despite the fact that a new paradigm may emerge, a large number of orthodox scientists will never be converted to the new paradigm. It can also occur that a new paradigm will often fail to ascend to superiority, not because orthodox scholars have not been converted to the new paradigm, but merely by reason of the fact that the orthodox scientists will eventually abandon their positions and be replaced by a new generation of scientists, that adhere to the new

⁸⁶ Kuhn (n 49 above) 92.

⁸⁷ Kuhn (n 49 above) 93.

⁸⁸ Kuhn (n 49 above) 103.

⁸⁹ Kuhn (n 49 above) 110. Beerling (n 44 above) 152 explains that such extra-scientific value judgments particularly determine the direction of the applied sciences (and therefore legal science as well).

⁹⁰ Kuhn (n 49 above) 122-123.

⁹¹ Kuhn (n 49 above) 144.

paradigm.⁹² The older generations are also often convinced that the old paradigm in which they were bred will eventually succeed in overcoming the incapacity that caused them to experience the crisis. Another way in which one may react to such paradigmatic crisis (other than to embrace the promises of a new paradigm), is that one may conclude that the problems confronting the existing paradigm are so complex that they cannot be resolved and then place the problem on hold to enable a new generation to tackle it at a later stage.⁹³ This means that the problem is simply avoided.

On the other hand, adherence to a new paradigm often requires an act of faith. The new paradigm is accepted even before there is enough evidence of its success, and purely on the strength of a belief that it will overcome the problems that confront it.⁹⁴

Sheldon Wolin is of the opinion that there is a difference between the paradigms of the natural sciences and that of political science inasmuch as the former has the propensity of concealing paradigm shifts, which creates an impression of continuity, while the paradigms of political science place the emphasis on neologisms and discontinuity.⁹⁵ Political theory does therefore not focus on normal science, or on the refinement and application of an existing theory.⁹⁶

Legal scholarship, and in particular constitutional law and related disciplines, being applied sciences, are, however, imbedded into a single politico-theoretical paradigm and are aimed at the refinement and utilisation of the possibilities offered by such paradigm. The statist paradigm that was established in the sixteenth and seventeenth centuries (see chapter 4) as a consequence of the politico-theoretical work discussed earlier, drew the boundaries of large parts of legal scholarship, as explained in the first part of this chapter. The paradigm determines the aims to be accomplished and simultaneously precludes other aims as being scientifically unwarranted and irrelevant. The paradigm also lays down the rules to be followed to fulfil the aims contained within the paradigm. The paradigm also rules other methods of fulfilling those aims out of order. Furthermore, the principles contained in the paradigm already anticipate the answers to questions asked within the framework of the paradigm.

⁹² Kuhn (n 49 above) 150-151.

⁹³ Kuhn (n 49 above) 84.

⁹⁴ Kuhn (n 49 above) 158.

⁹⁵ Wolin (n 49 above) 141-142.

⁹⁶ In my opinion Wolin's view is controversial. Political philosophy quite often sails under the flag of statist philosophy, which has but a single paradigmatic focal point – the state – despite embracing a variety of theories.

In the following chapters, core aspects of the statist paradigm will receive our attention. In chapter 6 *state building*, which poses under the deceptive banner of *nation building*, will be discussed. Its aim is to inculcate a statist individual identity. It will be pointed out how legal categories are being applied for this purpose. Chapter 7 focuses on democracy and democratic theory and explains how democracy, which has the potential of placing the existing statist order under pressure, has been tamed (domesticated) in the interests of statism, with the assistance of theorising according to the statist paradigm and how democracy was ultimately placed in the service of statist identity. Theorising about democracy in terms of the statist paradigm gave rise to a specific definition of democracy that enables it to serve the interests of statism. On the other hand, other contents that could be ascribed to democracy were censured because it could unsettle statism. Chapter 8 deals with human rights. In that chapter, it will be pointed out that in spite of the fact that human rights appear to restrict the state — in the form of government — these rights ultimately bring support to the state and cause the worsening (and normalising) of individual and group dependence on the state. In chapter 9 two general legal concepts will be discussed, which are symptomatic of how legal strategies are employed in legal scholarship to serve the statist order. High treason will be discussed first, to be followed by a survey of the international law position regarding territorial integrity and the concomitant restrictions on self-determination and secession. Under the heading of *Politocracy*, chapter 10 is dedicated to an attempt to conceive of an order beyond statism.

CHAPTER 6

STATIST IDENTITY: THE MORTAL GOD ACQUIRES A CONGREGATION OF WORSHIPPERS - *THE NATION*

1 State building in the guise of nation building - Hobbes, Rousseau and thereafter

Medieval universalism¹ did not give way to nationality or nationalism. In fact, even as late as the eighteenth century, nationality and nationalism were not yet regarded as an important factor. Universalism had, however, yielded to dynastic states and their rulers.² Dynasties came to occupy the political position previously held by religion. Henceforth, political loyalty was shown primarily to the ruler. Such loyalty, however, was far weaker than the emotionally intensely religious fervour of earlier times. In his major work on nationalism Hans Kohn explains:

The new loyalty lacked the emotional fervor of religion; the State without the inner glow of religion or nationalism was a 'cold monster.' Thus the century from 1650 to 1750 was deeply rationalistic in its politics.³

The Hobbesian state of this era — the Leviathan or mortal god — is cold, reticent and aloof. He appears when individual conflict arises, fulfils his part as referee and then withdraws. All that he expects of his subjects is to refrain from trying to depose him and to live in relative peace with one another. Leviathan is not really interested in his subjects' identity, how they behave in isolation and what their beliefs are. Leviathan does not expect his subjects to be recreated in his image and does not lay down rules to regulate the behaviour of private individuals in any way that is worth mentioning. He is a cold monster who leaves his subjects alone, as long as they live in peace with him and all his other subjects. He is primarily passive in his relations with his subjects and does not drive any ideological programmes.

¹ This aspect is discussed in chapter 2.

² H Kohn *The Idea of Nationalism* (1944) 188.

³ Kohn (n 2 above) 188.

The formation of the state preceded the building of the nation (nation of course, in the statist sense).⁴ The typical chronology was that the state was created first, whereafter the nation was established or developed within the political framework of the state⁵ or alternatively, that the state and the nation grew simultaneously, but that the state, acting through its organs, was the *active driving force* behind this growth-process.⁶

It was not only in Europe that states were first established and nations then came into being within the frameworks of such states. The same process also occurred in other parts of the world – also in Africa. The clearest and most permanent legacy of European political domination in Africa is to be found in the appearance of its political map. The African state borders are almost invariably the product of the activities of the colonial powers in Africa during the nineteenth and early twentieth centuries.⁷ These borders were drawn arbitrarily in conformity with the needs of and power relations existing among the former colonial masters, without any consideration for the wishes of the inhabitants of Africa who were to be affected most intimately by the determination of these borders. The African state borders were fought out among the European powers or agreed upon in Western capital cities through agreements between colonial powers. Africa had nothing to do with it. It is within these arbitrary borders that much toil is still expended in the attempt to build nations:

The stabilization of the nation state (often built on old colonial bureaucratic infrastructures) occurred for the most part without grassroots participation or any form of democratic debate.⁸

Against this background one can correctly assert that African nations exist only in a geographical sense, and in no way in a cultural or linguistic sense.⁹

⁴ CJ Friedrich *Man and his Government: An empirical Theory of Politics* (1963) 547. Of course there are exceptions, such as the formation of the German nation before the German state was founded.

⁵ Friedrich (n 4 above) 547.

⁶ Friedrich (n 4 above) 548.

⁷ Makau wa Mutua 'Why redraw the map of Africa: A moral and legal inquiry' (1995) 16 *Michigan Journal of International Law* 1113-1176. See also in general I Brownlie *African Boundaries: a legal and diplomatic encyclopaedia* (1979).

⁸ J Franco 'The Nation as Imagined Community' in HA Veesser (ed) *The New Historicism* (1989) 205; See also Makau wa Mutua (n 7 above).

⁹ AJ Venter 'Questions of National Identity in Post Apartheid South Africa' Konrad Adenauer Stiftung *Occasional Papers* (1998) 13.

The same applies to South Africa, which was a state without a nation when it was formed in 1910.¹⁰ The close ties of communality in respect of language, culture, a common historical consciousness, etc which should be the necessary requirements for the existence of a nation, were just too weak or even nonexistent. There is in fact still no South African nation.¹¹ The name *South Africa* does also not refer to a nation, but is a mere geographical indication.¹² The excitement that followed immediately upon the constitutional settlement of 1994 and the boisterous 'we are one' reference to a single *rainbow nation*, have completely yielded to the harsh reality of South Africa as a fundamentally divided society devoid of true nationhood. The vaunted South African constitution, which has been praised with almost toddler-like glee as the best of its kind in the world and had to provide the foundation for building a common nationhood on a basis of constitutional patriotism, also failed to produce the nation it was expected to.

Without a nation loyal to the state and a state population experiencing mutual ties of communality, the state is merely a mechanistic instrument that exists for the purposes of governance and maintaining the peace among individuals. However, statist schools of thought since the sixteenth century, and especially since the eighteenth century, are not satisfied with this timid and aloof mechanistic state. They have in fact been endeavouring to create a new corporate basis, a new corporate mysticism, as a sacred entity in its own right. The new corporate basis is the nation.¹³ In terms thereof the state should not only be an institutional structure, i.e. a tool of government in a defined territory, nor merely the holder of the highest legitimate authority within a determined territory. No, the state also requires a substructure — a sociocultural basis — a communal tie of sentiment, which is to be found in the nation.¹⁴

As a political configuration the medieval *Repubblica Christiana* finally gave way to the state as the new primary political structure. However, religion as the primary political identity within the

¹⁰ JJ Degenaar 'Nations and nationalism: The myth of a South African nation' (1993) 40 *Idasa Occasional Paper* 4. J Gagiano J 'The Contenders' in WP Esterhuyse and P du Toit P (eds) *The Myth Makers: The elusive bargain for South Africa's future* (1990) 32 explains that South Africa is not a community — whether plural or otherwise — but rather a universum of fragmented groups occupying the same political, social and economic space in a common geographical territory.

¹¹ HB Giliomee 'Building a new nation: Alternative approaches' in Cloete *et al* (eds) *Policy options for a new South Africa* (1991) 67. On 29 May 1998 Thabo Mbeki, a previous South African head of state, stated in a parliamentary speech that South Africa does not have only one but two nations: a white nation and a black nation. Venter (n 9 above) 1, 2 also proceeds from the assumption that no South African nation exists.

¹² Venter (n 9 above) 2.

¹³ Friedrich (n 4 above) 554.

¹⁴ Friedrich (n 4 above) 555.

Repubblica Christiana had not yet produced an alternative identity within the new statist structure, which fit into or supported this new structure. One can formulate this differently by asserting that Hobbes' mortal god had not yet found a parish of supporters and worshippers. The mortal god was still lonely and still lacked a loyal and praising nation that gathered around him.

A *civil religion*, or rather ideology, bolstering the state would, however, gradually emerge, thanks to the work of, among others, Francois d'Aguesseau and Jean Jacques Rousseau. It was in fact established during the French Revolution, due to the actions of figures like Sieyès and the Jacobin totalitarianism of Robespierre and Saint-Just. Nowadays it lives on in mainly discredited¹⁵ nation-building projects.

Prototypical nation-building projects were also stimulated by changes to social realities. Feudalism was in the process of disintegrating under the pressure of social and economic forces. The old concept and reality of society, based on individual immobility and unaltered status due to the permanent membership of classes, started to yield in favour of the individual person.¹⁶ Previously, small geographically bound groups and feudal classes, within which an individual was born and would remain for the entire duration of his life, were the primary source (together with religion) of individual identity. However, the situation changed and gradually only one framework would become available for human interaction – the nation. The decline of religion and the freeing of human conscience created the need for a new secular morality. Now, the state would be the only available source and sanction of public morality.¹⁷

Nation-building projects represented a revolutionary schism with traditional politics. In earlier times – in the Middle Ages – politics were far removed from ordinary people.¹⁸ Nation-building projects changed all of this. Nation building entails the ideological mobilisation and disciplining of all individuals, irrespective of whether they wish to be involved or not. New ideological politics were already introduced with Calvinistic radicalism,¹⁹ which aimed to accomplish a broad and radical change in society by involving everyone in the process. Whereas Calvinistic *nation building* was aimed at preparing man for the hereafter, nation building, which will be further discussed in this chapter, has only a secular master: the state.

¹⁵ Giliomee (n 11 above) 1.

¹⁶ Kohn (n 2 above) 226.

¹⁷ J.L. Talmon *The origins of totalitarian democracy* (1970) 3-4.

¹⁸ M. Walzer *The Revolution of the Saints: A Study in the Origin of Radical Politics* (1966) 4-6.

¹⁹ Walzer (n 18 above) 10-11.

The origin of rationally considered nation-building projects can be traced back to a speech delivered by the French jurist D'Aguesseau in 1715, at the time of the death of Louis XIV. In his address he argued that the sovereign's authority and the population's obedience originated from a mutual tie, namely everyone's love of the fatherland. Each subject should experience an active involvement in the affairs of the fatherland, which will foster a feeling of mutual brotherhood among all subjects, as if everybody belonged to the same family. Such love for the fatherland should also be a type of love for oneself — so intense that it will eventually exceed one's love for oneself.²⁰

It is the works of Rousseau, however, that contain the materials in which the foundations of nation building are discussed in detail. This statement should, however, be qualified immediately, for although nation building and state solidarity are Rousseau's highest priority, he is by no means a political philosopher of the extensive modern territorial state. When Rousseau explains what has to be done to strengthen the mutual ties among citizens and to forge unbreakable ties between the state and the citizenry in order to give expression to the general will of the nation, he does so against the background of a small political unit like a city state. He continuously employs his *polis* of birth, Geneva, as his frame of reference, and not the encompassing and richly populated and erstwhile leading territorial state, France. Rousseau's preference was always for the domestic, the homogeneous and the particular.

He explains in his *Social Contract* that economic and administrative considerations make it imperative for the state to be of a limited extent. Of far greater importance, however, is his political justification for the limited extent of the state. In this respect Rousseau expresses himself as follows:

The same laws will not suit so many various provinces, which, with their different customs and contrasting climates, cannot tolerate the same kind of government. Having different laws only creates misunderstanding and confusion among peoples who live under the same governors and are in continuous communication with one another ... Talents are hidden, virtues are ignored and vices remain unpunished when such multitude of men, who do not know one another, is brought together in the same place by one single seat of supreme administration.²¹

On the necessity of the state to be homogeneous and of limited extent, Rousseau expands his argument as follows:

²⁰ H Kohn (n 2 above) 205.

²¹ JJ Rousseau *The Social Contract* (English translation with introduction by M Cranston) (1968) 91-92.

Which people, then, is fit to receive laws? I answer: a people which finding itself already bound together by some union of origin, interest or conviction ... a people in which every member may be known to all; where there is no need to burden any man with more than he can bear; a people which can do without other peoples and which other peoples can do without.²²

Rousseau's preference for the homogeneous and the particular is even more patent in his treatise on Poland, wherein he laments the decline of particular identity, which he thought could be perceived in his time. In a passage resembling a commentary on our modern consumer society, he expressed himself with the following cutting words:

Today, no matter what people might say, there are no longer any Frenchmen, Germans or Spaniards, or even Englishmen, there are only Europeans. All have the same tastes, the same passions, the same manners, for no one has been shaped along national lines by peculiar institutions. All in the same circumstances, will do the same things; all will call themselves unselfish and be rascals; all will talk about the public welfare, and think only of themselves; all will praise moderation, and wish to be as rich as Croesus. They have no ambition but for luxury, they have no passion but for gold; sure that money will buy them all their hearts desire, they all are ready to sell themselves to the first bidder. What do they care what master they obey, under the laws of what state they live? Provided that they can find money to steal and women to corrupt, they feel at home in any country.²³

Accordingly he encouraged the Poles to love and honour all that is Polish.²⁴ Rousseau once again argued here that a big state is undesirable, that small states are prosperous due to their limited extent and that all citizens should know one another.²⁵ He also explained to his Polish readers that their state was much too large and that, for administrative purposes, it had to be divided into a number of controllable republics (under the overarching, but indirect authority of the Polish king).²⁶

In his constitutional project for Corsica, Rousseau told his readers that democracy – one of the key elements of his political theory – is not attainable in a large territorial state. Democracy, which to Rousseau by definition meant direct democracy, can only be attained in a close-knit political unit where all citizens can assemble at the same time.²⁷

²² Rousseau (n 21 above) 95.

²³ JJ Rousseau *Considerations on the government of Poland and on its proposed reformation* (English translation edited by F Watkins) (1953) 168-169.

²⁴ Rousseau (n 23 above) 171.

²⁵ Rousseau (n 23 above) 181-182.

²⁶ Rousseau (n 23 above) 182-183; 233.

²⁷ JJ Rousseau *Constitutional project for Corsica* (English translation edited by F Watkins) (1953) 286-287.

It is clear that Rousseau should certainly not in any way be regarded as a philosopher of the territorial state. In fact, as the quotations from his works show, he reveals himself to be an *opponent* of the territorial state, in which citizenship is deficient and people live as individuals, rather than citizens. Rousseau is a leading exponent of a close, almost intimate republicanism modelled on the Greek city states of ancient times,²⁸ or then at least of Rousseau's own romanticised version of his city of birth, Geneva.²⁹

Other political philosophers and politicians, however, who stood within the statist paradigm and thought along its lines, were eager to take Rousseau's work from the context of a small homogeneous *polis* and in fact transplant it into the territorial state, and utilise it in order to boost the development of a civil and individual identity according to the claims of the territorial state.

To Rousseau, the state – the *res publica* – was the highest virtue. All human conduct should aim to reinforce the state (here, the *polis*). Private matters should receive minimal attention and individuals should apply their energies to foster mutual interests, embodied in the state. Accordingly, the primary (and perpetual) individual identity and status is that of state (*polis*) citizenship. Above all other things, individuals are first and foremost state citizens who have to make their energy available in the service of public affairs that affect everybody. Patriotic virtues must be fostered and citizens should constantly be involved in matters of state. The interests of the fatherland – again the *polis*, according to Rousseau's theory – should be the primary concern of its citizens and they should constantly be watchful of the fatherland's well-being.³⁰

Just as the medieval *Repubblica Christiana* had been supported by a fitting political identity, namely that of being Christian, the new political structure of the state was also in need of its own supporting identity, namely that of state citizenship. To Rousseau's mind there is no place for *laissez faire* politics. A sustainable programme has to be in operation to develop and maintain the statist identity of citizenship and to combat any possible erosion, undermining or challenging thereof. All of this has to happen in order to maintain the integrity and stability of the state.

²⁸ See for example R Wolker Rousseau (1995) 55.

²⁹ All Rousseau's works reflect his high esteem of the republican culture of Geneva. For example, he dedicated his essay on the origin of inequality to Geneva. See JJ Rousseau *A Discourse: What is the origin of inequality among men and is it authorized by natural law?* (English translation with introduction by GDH Cole) (1963) 144-153, especially 144.

³⁰ Rousseau (n 23 above) 170.

Rousseau maintains that although individuals will often spot the good, they will reject it nonetheless. It also occurs quite frequently that the public desires the good, but are unable to identify it. In both these cases there is a need for guidance:

Individuals must be obliged to subordinate their will to their reason; the public must be taught to recognize what it desires.³¹

Obviously, not all people will be prepared to accept state citizenship as the primary element of their identity. It is possible that other identities may be preferable. Rousseau, however, had an answer to this. His project is of a coercive nature. The individual has to undergo change. He absolutely must adopt a new identity. The state's quest for nationhood must be successful. This, however, is not as harsh as it may sound, for as Rousseau promises, the individual will ultimately enjoy the fruits of his change in identity:

Whoever ventures on the enterprise of setting up a people must be ready, shall we say, to change human nature, to transform each individual, who by himself is entirely incomplete and salutary, into a part of a much more greater whole, from which that same individual will then receive, in a sense, his life and his being.³²

Furthermore, the state must be organised in such a way that individual citizens are made maximally dependent on the state in order to assure that the strongest possible ties are forged between the state and its citizens.

Rousseau declares himself to be against the concept of representation that had already been well established in medieval politics,³³ because that would remove citizens from affairs of state and cause them to become obtuse. When citizens are represented, it causes them to have too much time on hand to spend on their own private affairs, which may lead to a neglect of the affairs of state. In a healthy republic all citizens have a direct interest in state affairs and for that reason they should be personally involved. The better organised the state is, all the more individual citizens will display a preference for public affairs, instead of their own private affairs. Public well-being should in fact occupy the minds of the citizenry to such an extent that the pursuit of individual happiness will fall by the wayside almost unnoticed. In a well-governed state, all citizens will enthusiastically attend all public forums, instead of entrusting state matters to representatives.³⁴

³¹ Rousseau (n 21 above) 83.

³² Rousseau (n 21 above) 84.

³³ RW Carlyle *A History of Medieval political theory in the West* (1928) Vol V: 129, 139; Vol VI: 89-110.

³⁴ Carlyle (n 33 above) Vol V: 140-141.

An educational programme aimed at fostering and maintaining citizenship should be undertaken. The programme must be designed to advance the fatherland – of course, to Rousseau still the *polis* – as the highest value and to permeate individual citizens, from an early age, with loyalty towards the state.³⁵ For Rousseau, national character forms the cornerstone of a healthy state and he expressed the frank opinion that when that is lacking, it should simply be created:

... each people has, or ought to have a national character; if it did not, we should have to start by giving it one.³⁶

Rousseau's cherishing of the state also determined his religious and economic views. In the last chapter of his *Social Contract*, under the heading of *Civil Religion*, Rousseau lamented the schism between religion and politics that was caused by Christianity. This schism caused religion to desecrate politics – the affairs of state. Before the arrival of Christendom, religion had been a particular phenomenon that had been weaved into every community in varying ways and had supported each of those communities with its own particular religion in a unique way. In contrast, Christian religion has a universal appeal and indeed because of this cannot provide such specific support. Instead, a rather tense relationship exists between this and the particular political communities. It is hostile towards the state because it serves a nonpolitical and nonworldly order.³⁷ Rousseau regarded it as imperative that politics – the affairs of state – should again acquire a sacred character. With this in mind, the state is in need of a civil religion, or rather a myth of its own, which could serve the state:

There is thus a profession of faith which is purely civil and of which it is the sovereign's function to determine the articles, not strictly as religious dogmas, but as expression of social conscience, without which it is impossible to be either a good citizen or a loyal subject.³⁸

As a result of Rousseau's brainchild, Hobbes' Leviathan acquired worshippers which it did not have in the seventeenth century.³⁹ Furthermore, along with the worshippers of the mortal god, a civil religion made its appearance. This, obviously, made Hobbes' Leviathan much stronger than Hobbes himself could ever have predicted.

³⁵ Rousseau (n 23 above) 176-177.

³⁶ Rousseau (n 27 above) 293.

³⁷ Rousseau (n 21 above) 176-183.

³⁸ Rousseau (n 21 above) 186.

³⁹ Rousseau was not alone in arguing in favour of a civil religion. It was a typical trait of the philosophy of the Enlightenment. Like Rousseau, some of his contemporaries also regarded it as impossible to be a good citizen and a good Christian at the same time. See JL Talmon (n 17 above) 21-24.

Rousseau's economic politics fit in with his political thought. It was not aimed at furthering the accumulation of private wealth, but at creating a free and self-sufficient nation.⁴⁰ Accordingly, the state economy should be designed in such a way that it enhances the internal cohesion among the citizenry and strengthens the state. Love for the fatherland should be the dominant passion. The pursuit of private wealth, luxury and pleasure is detrimental to the reinforcement and intensification of love for the fatherland, because it kindles private enterprise. It focuses the attention of individuals on private gain and isolates them from their fatherland. Therefore, the accumulation of private wealth must be discouraged.⁴¹ A value system, based on a culture of pomp and luxury, must be prevented. Instead, republican values, which place a low premium on private wealth, should be established. Laws aimed at combating pomp must accomplish this turnabout. However, this as such would not be sufficient. In particular, a deep-seated change of heart should emerge,⁴² causing citizens to abandon, of their own accord, any yearning for wealth. Citizens should instead give expression to the highest republican value – service to the state. When such a change of value has occurred, people will no longer experience the urge to own scarce economic commodities. What people previously experienced as scarce, will no longer be experienced as such.⁴³ The craving for material things will therefore be lost. Rousseau summarises the rejection of the pursuit of wealth and the embrace of republican values as follows:

... it is sufficient here to explain my idea, which is not to destroy property absolutely, since that is impossible, but to confine it within the narrowest possible limits; to give it a measure, a rule, a rein that will contain, direct and subjugate it, and keep it ever subjugate to the public good.⁴⁴

Once this change of values has been achieved, the pleasure that citizens will derive from serving the state will be their richest reward. Such new values will render the pursuit of private wealth no longer advantageous.

The concept for which Rousseau is probably best known, is the *volente generale*. Where, since the times of Bodin, sovereignty was vested in the sovereign, Rousseau was of the opinion that the general popular will should be sovereign. Decisions may only be taken on the basis of the general will, for it is that will that is sovereign.⁴⁵

⁴⁰ Rousseau (n 23 above) 224.

⁴¹ Rousseau (n 23 above) 174.

⁴² Rousseau (n 23 above) 14-175.

⁴³ Rousseau (n 23 above) 230.

⁴⁴ Rousseau (n 27 above) 317.

⁴⁵ Rousseau (n 21 above) 69.

Rousseau's views on the general will provide the key to his approach to equality, and simultaneously explain his vehement disapproval of any semblance of pluralism. In addition, it is Rousseau's general will that developed into full-scale totalitarianism.

The general will is an expression of the common public interest. Such will is always right and just and will always serve the public interest. The public will, however, is not necessarily to be derived from the will of the majority. In fact, even if everybody would agree on a specific issue, this as such does not imply that such agreement represents an expression of the general will, because to Rousseau's mind, individuals are always pursuing the fulfilment of their personal interests and often fail to realise that they are at odds with the general will. It may therefore occur that unanimous will merely represents a collection of individual wills, which pursue individual interests and disregards the general will. In terms of Rousseau's theory people are often misled and this causes the general will to be neglected and only the bad, instead of the good, to be willed:⁴⁶

There is often a great difference between the will of all (what all individuals want) and the general will; the general will studies only the common interest while the will of all studies private interest and is indeed no more than the sum of individual desires.⁴⁷

From this it would follow that the general will leads an objective and independent existence, which can possibly even be understood by only a single individual person, while the rest of the citizenry is ignorant of what the general will (and interest) entails, due to their pursuit of private interests.

The *generality* of the general will cannot necessarily be ascribed to the (large) number of people which hold the same view, but rather to that which represents a true reflection of the common interest.⁴⁸ The general will is the general will not because it receives support, but because it is right.

The particular will of any individual will always be suspect, because it can oppose the general will. The general will judges the individual wills and is the exclusive judge of what is right and what is wrong.⁴⁹

Just as nature gives man an absolute power over all his limbs, the social pact (by means of which the state is established), gives the body politic an absolute power over all its members. And it is this same power which

⁴⁶ Rousseau (n 21 above) 72.

⁴⁷ Rousseau (n 21 above) 72.

⁴⁸ Rousseau (n 21 above) 76.

⁴⁹ Talmon (n 17 above) 41.

directed by the general will, bears as I have said, the name of sovereignty.⁵⁰

Of course, the problem lies in the question of how to find the general will. Rousseau could never really furnish an adequate answer to this, for if the majority can err, who is then to formulate the general will? Rousseau provided his own convenient, but unconvincing answer to this question. His view was that the majority will, after all, articulated the general will, with the result that the majority will then always bind the rest, who are not in tune with the general will:⁵¹

When a law is proposed in the people's assembly, what is asked of them is not precisely whether they approve of the proposition or reject it, but whether it is in conformity with the general will which is theirs; each by giving his vote gives his opinion on the question *and the counting of the vote yields the declaration of the general will*. When therefore, the opinion contrary to my own prevails, *this proves only that I have made a mistake*, and that what I believed to be the general will was not so⁵² (own emphasis).

In Rousseau's opinion the people is completely monolithic. The people speaks through the general will, which means that it has but a single voice. The people is a unit that moves forward in unison. The minority view, which is not in conformity with the general will (as reflected by the majority view), is not merely an *alternative* view, but a *wrong* view and those adhering to it are under an obligation to abandon it. According to Rousseau's theory there is indeed no respect for and protection of the minority view, for he states:

... whoever refuses to obey the general will shall be constrained to do so by the whole body, which means nothing other than that he shall be forced to be free.⁵³

It is patently clear that Rousseau was confronted with a huge dilemma: how could he be an ardent advocate of freedom and then, in the same breath, deliberately subjugate that freedom, as expressed in individual and minority views, to the majority will that appears in the guise of the general will? Rousseau avoided this dilemma by arguing that the minority have squandered and abused their freedom and that the majority merely assist the minority by offering the minority the genuine freedom represented by the majority will, which the minority will then be forced to observe. In this way the minority can also enjoy genuine freedom.⁵⁴

⁵⁰ Rousseau (n 21 above) 74.

⁵¹ Rousseau (n 21 above) 153.

⁵² Rousseau (n 21 above).

⁵³ Rousseau (n 21 above) 64.

⁵⁴ Talmon (n 17 above) 40.

Since Rousseau's general will has to indeed be *general*, it does not tolerate any plurality, differences, diverging views, or fragmented groupings.

Thus if the general will is to be clearly expressed, it is imperative that there should be no sectional associations in the state, and that every citizen should make up his own mind for himself.⁵⁵

Rousseau's politics therefore involve two entities in the construct of public order, namely the *state* and the *individual* (the individual citizen). Individuals may only be organised in the collective context of the state, and not in sectional fashion, into groupings. State citizenship therefore has an exclusive claim to the public identity of individuals. Within the public domain individuals may only be citizens and nothing more. All other group identities must be energetically resisted, as they may bedevil the statist identity of individuals and their loyalty towards the state. In modern terms, within the context of the territorial state, this would mean that the *state nation* does not tolerate any linguistic, ethnic, cultural, religious or any other non-statist identity. Free association and the concomitant establishment of a pluralistic order are completely out of the question. The state – the mortal god, according to Hobbes – does actually become a jealous god in Rousseau's times. He collects a nation in his own image and establishes irrefragible ties with the individual citizens of the nation. He tolerates no divided loyalties on account of any involvement in communities and groups other than the state itself. Private interests and group formation must therefore be vigorously opposed.⁵⁶ Rousseau's aim was to create a new identity and therefore a new type of person.

The aim is to train men to 'bear with docility the yoke of public happiness', in fact to create a new type of man, a purely political creature, without any particular private or social loyalties ...⁵⁷

The monopoly of state citizenship over individual identity also provides the key to understanding Rousseau's well-known view on equality. Inequalities cause economic class divisions and consequently a plurality of divergent class identities. Rousseau therefore argued that in the light of the necessity of recognising citizenship as the only existing public identity, all inequalities, like those ascribed to the existence of feudal structures, need to be removed.⁵⁸ All people have to be state citizens on an equal footing. It is undesirable that classes

⁵⁵ Rousseau (n 21 above) 73.

⁵⁶ Rousseau (n 21 above) 150. See further Rousseau (n 23 above) 199-203 where Rousseau enters into a detailed discussion on what steps have to be taken to prevent group formation.

⁵⁷ Talmon (n 17 above) 42.

⁵⁸ Rousseau (n 27 above) 287.

should exist, as this creates a class identity in addition to the identity of state citizenship. When there are classes, state citizens can obviously not speak with one voice. As long as classes and groups exist, the general will remain unattainable. In order to protect the integrity of the general will, group and class diversity have to be destroyed. For that reason Rousseau advised the Corsicans as follows:

The fundamental law of your new constitution must be equality. Everything must be related to it, including even authority, which is established only to defend it. All should be equal by right and birth; the state should grant no distinctions save for merit, virtue and patriotic service ...⁵⁹

In order to attain equality, Rousseau also argued that the legal system has to be altered in such a way that it becomes accessible and intelligible to the ordinary citizen. There should therefore be a simple popular legal system and judges should be elected from the ranks of the ordinary citizens. There is no need for intricate legal rules, like those contained in the *Corpus Iuris Civilis*. To Rousseau's mind such rules are simply rubbish.

All the rules of natural law are better given in the hearts of people than in all the rubbish of Justinian.⁶⁰

Immanuel Joseph Sieyès (1748-1836) further developed the implications of certain parts of Rousseau's political philosophy in greater detail. He also exerted an influence during the French Revolution, in which he played an important part.

Sieyès was a great champion of the notion of national unity. It is national unity that provides the opportunity to be able to articulate the general will. Just as Rousseau, he argued that the major scourge and the greatest stumbling block in the way to the attainment of national unity, is *esprit de corps*, i.e. rather private identities and loyalty towards groups. Instead of completely and unflinchingly embracing a common citizenship, those associating with particular groups are just recalcitrant individuals and groups, who are pursuing their own *private* goals and in doing so plainly refuse to conform to the general (*public*) will.⁶¹ Where such varying sectional wills are in existence, through which private interests are articulated, no general will can exist. The simple solution therefore is that sectional wills must be eliminated for the sake of the general will. In this way a monistic order of unity and equality will be established.⁶²

⁵⁹ Rousseau (n 27 above) 289.

⁶⁰ Rousseau (n 23 above) 221.

⁶¹ Talmon (n 17 above) 73.

⁶² Talmon (n 17 above) 74.

The two great drivers of the Jacobin project, Robespierre and Saint-Just, believed, just like Rousseau, that the nation only recognises individuals as constituting building blocks.⁶³ They had the same disdain for particular group identities.

When one compares Rousseau's work to that of Jean Bodin, discussed in chapter 4, it becomes abundantly clear that there are important differences between them as a result of the fact that they reacted to different issues. Nevertheless, one notices at the same time, an equally conspicuous consistency and continuity, from Bodin in the sixteenth century to Rousseau and his state-building successors who came two hundred years later – one unmistakable golden thread that weaves through all the schools of thought. Bodin also regarded groups (in his case, religious groups) as the greatest evil. In conformity with the thought of later state builders, he also regarded state citizenship as the only public identity and, just like such later state builders, he believed that all other identities must be excluded from the public sphere and firmly embedded in the private domain. Like Bodin, Rousseau, Sieyès, Robespierre and Saint-Just faithfully guarded the state's monopoly over the public domain. All of them were equally antipluralistic. Where Rousseau and his followers differed from Bodin, was in the fact that they launched a popular project. In terms of the theories of both Bodin and Hobbes the state is aloof and distant, but according to the work of Rousseau and his followers the public is intimately involved in the affairs of state. Where Bodin and Hobbes argued that the state is merely the keeper of the peace and does not belong to anybody and is as such akin to a *res nullius*, it now became a complete and compulsory *res publica*.

Rousseau provided the theoretical spark that kindled the so-called nation-building projects that are so commonplace these days. Whereas Rousseau, as explained earlier, did not in fact think in terms of the statist paradigm, Sieyès, Robespierre and Saint-Just actually transformed Rousseau into the statist paradigm and mobilised him to serve statist identity. According to this, the continuous train of thought would appear as follows: the premise is that the state (for example the South African state) is a permanent and an invariable given. It is an absolute fixed point of departure and the invariable framework within which all theoretical work on public affairs must be undertaken. This is so, despite the historical fortuity and artificiality of the state, which is ruled beyond debate. The existence of the state as an invariable given elicits the question about what has to be done to stabilise the state and to entrench it in its present form. The answer to this is then found in a state-inspired project of *social engineering*, which is state building sailing under the misleading flag

⁶³ Talmon (n 17 above) 93.

of *nation building*. Such project entails that a nation must perforce be created for the sake of the state, in order to support it. It is not the state that has to come into existence to support the nation. On the contrary, a nation has to make its appearance for the sake of the state. The state as structure is thus the active agent that has to determine the culture and must change the people for the sake of the state structure. It is not the structure that has to be adapted in accordance with the people's culture, viz the identities (and needs) of the people. On the contrary, the state creates a nation for itself after its own wishes and after its own image. By means of state-serving nation building the state becomes the determiner and modifier of the people's identity. Here we observe the statist paradigm in full force.

2 The coercive logic of nation building

With the transplantation and application of Rousseau's reasoning, from its original framework of the restricted and homogeneous city state to the large and heterogeneous territorial state, the foundations of totalitarian democracy, which often went hand in hand with a nation-building project, were laid. Totalitarian democracy takes a hostile stance towards pluralism – a collection of communities and a variety of political persuasions – and in contrast, wishes to establish a single exclusive (political) truth.⁶⁴

This means that only one identity and way of life, one type of person who is shaped in accordance with the needs of the state, one prescribed set of political conceptions and only institutions complying with the dictates of these conceptions would be tolerated. That is the public identity, way of life, conceptions and institutions as seen and enforced by the dominant political power – normally the majority component – in the territorial state. Logically speaking this also means that all nonconforming conceptions, institutions and identities are actively excluded. According to JL Talmon this totalitarian democracy has a messianic vision in terms of which citizens of the state, who have not yet assumed the new identity, have to change in conformity with a conception previously designed by the dominant forces as to the identity which all inhabitants have to adopt, in order to fall into step with the dominant forces and to enable everyone to live together in perfect harmony as a new nation. A political project is being waged to execute such vision.⁶⁵ A single embracing political philosophy must determine human conduct and finally, the political reality has to comply with the dictates of this philosophy – which is,

⁶⁴ Talmon (n 17 above) 1.

⁶⁵ Talmon (n 17 above) 2.

in fact, an ideology.⁶⁶ People are not treated in terms of what they really are, but of what they should and will be, as soon as the ideal situation of the new nation realises according to the dictates of the ideology.⁶⁷ The wishes and convictions of those who are unable to reconcile themselves with the set ideal can simply be ignored. They can be coerced and intimidated to finally conform to the set ideal.⁶⁸ The insistence that people must change to reconcile themselves with the ultimate destination and to accept the prescribed identity of the new nation, strangely enough occurs in the name of freedom. Rousseau argued that genuine freedom means that people realise that their self-interest is erroneous and will therefore abandon it in order to accede and conform to the general will.

This skewed conception of freedom⁶⁹ entails that people rise against themselves to become new people, motivated by a new truth. On the one hand there are people who are members of particular communities and who actively experience their own identities, historical backgrounds and visions of history, sentiments, needs and interests. On the other hand, one will find the *genuine* and *liberated* person, the person who is brought into being as soon as he subjugates himself to the prescribed dominant conception, has reconciled himself with the supposed higher entity of the nation and has abandoned his previous identity. People should relinquish their own *egotistically inspired errors* to enable them to find harmony within the larger sublime entity.⁷⁰ The 'old' person must renounce his lost apparent self – his erroneous ways – convert himself from his aberrations and essentially be reborn as a new person, in step with the suspected more sublime entity.

According to Rousseau and his state-building followers, individual persons and particular communities must avoid false allurements that accompany a continued association with private entities and communities. Instead, they must fully comply with the dictates of the true general will symbolised by the new nation. They are obliged to abandon any association with specific communities and subject themselves, without any qualification, to the monolithic entity – the state – and with a similar lack of qualification reconcile themselves with the concomitant monolithic identity of state citizenship.

It is against this background that Isaiah Berlin said that Hobbes displayed more honesty than Rousseau. According to Berlin, Hobbes did not pretend that his sovereign was not authoritarian. He merely

⁶⁶ Talmon (n 17 above) 2.

⁶⁷ Talmon (n 17 above) 3.

⁶⁸ Talmon (n 17 above) 2.

⁶⁹ I Berlin *Four Essays on Liberty (Two Concepts of Liberty)* (1969) 131 *et seq* refers to it as 'positive freedom', only to criticise it sharply immediately afterwards.

⁷⁰ Berlin (n 69 above) 134.

tried to justify it. Rousseau, on the contrary, with his skewed conception of freedom, had according to Berlin, the audacity to depict subservience to the sovereign (the general will) as freedom.⁷¹

Upon close inspection, Rousseau's conception of freedom functions as an insidious power strategy: the strategy of obscuring power. The sovereign wields despotic powers, but his authoritarian hold over those it is imposed upon, is never apparent. Those under his submission are made to believe that the acceptance of the compulsive measures and the concomitant rejection of their own identities actually imply the embracing of freedom. Berlin explains this as follows:

The triumph of despotism is to force the slaves to call themselves free. It may need no force; the slaves may proclaim their freedom quite sincerely; but they are none the less slaves.⁷²

Michael Walzer's ideas cast further light on the brutal coercive politics that we are confronted with here. Walzer demonstrates that philosophy (in the sense of rationally considered political conceptions) and democracy are opposites.⁷³ A political philosophy wants to carry out its rationalistic programme, irrespective of the popular will, or rather without considering the democratic choices (which are, of course, varying choices) of those to whom it will apply.⁷⁴ Rousseau pretended that no such schism exists, because (as will be remembered) according to him, the nation should design its own simple, intelligible legal system instead of adopting a legal system that was created from the complex arguments of a few jurists. The schism, however, is not healed completely, because Rousseau required the people to pursue *general virtue* and that would only occur if they were to act as the true people pursuing the general interest who refrain from acting as 'egotistical' individuals or sub-communities. The true general will, however, can in turn only be expressed accurately in terms of a single set of objective laws. Other views that deviate from this authentic expression of the (pretended) true general will, merely articulate egotistical particular preferences. It will often occur that the people err by not realising what the general will is. It is when this happens that the philosopher – the ideologist – who comprehends the authentic general will, has to become involved in an authoritative way to correct the misconception and must indicate what the true will in fact entails.⁷⁵ As soon as that happens, the true general will is restored and the philosopher, who grasps the true state of affairs by applying his reason, is in charge.

⁷¹ Berlin (n 69 above) 164.

⁷² Berlin (n 69 above) 165.

⁷³ M Walzer 'Philosophy and Democracy' (1981) 9 *Political Theory* 379 *et seq.*

⁷⁴ Walzer (n 73 above) 383.

⁷⁵ Walzer (n 73 above) 384.

When the philosopher does that, he does not act in his capacity as an aloof philosopher, but as the legitimate interpreter of the general virtue.⁷⁶ According to Walzer, democracy entails that a community may make decisions, despite the fact that such decisions may possibly be wrong. Rousseau on the other hand, was of the opinion that the people's power to make decisions is restricted to making correct decisions. In fact, the people may only confirm what is already objectively correct. Should the people err, those who can fathom the *genuine* popular will – the general will – have the power to correct the people's mistake.⁷⁷

Nation building forms an integral part of the syndrome described. Likewise, it presents an ideal vision of a *state nation* and requires all inhabitants – in particular the minorities who are not (yet) in step with the state nation – to transform, to enable them to attain the ideal vision of such nation. In addition, nation building is at least uncomfortable, but usually openly hostile towards plurality. Nation building entails a programme that excludes the plural and particular from the public domain in favour of a single statist-inspired public identity, namely that of the state nation. The nation is regarded as something greater and more sublime than ethnicity⁷⁸ and superior to particular cultures, languages, historical experiences, religions, etc, that characterise minority communities in particular. All such particular identities should, for the sake of this pretended sublime nation, dissolve and vanish into it. Jan Gagliano therefore regards nation building as:

... the integration of communally diverse and/or territorially discrete units into the institutional framework of a single state and the concomitant transfer of a sense of common political identity and loyalty to the symbolic community defined by the founding ideology of such a state.⁷⁹

In light of this it becomes clear that the concept of *nation building* is obviously a misleading misnomer for the phenomenon confronting us here, because what these programmes protect and entrench are not nations in the sense of particular ethnic, linguistic, cultural and similar communities, but in fact two closely related matters: the state and the dominant forces – the ruling community – that controls it. It is therefore more apt to rather speak of state building, instead of nation building. The core aim of so-called nation-building programmes is to protect the state against the claims of communities who each have their own historical experiences, languages, identities

⁷⁶ Walzer (n 73 above) 385.

⁷⁷ Walzer (n 73 above) 387-393.

⁷⁸ Degenaar (n 10 above) 2, 7.

⁷⁹ Gagliano (n 10 above) 32.

and sentiments that are accommodated in a heterogeneous territorial state, but have to disappear in terms of the homogenising nation-building projects. These programmes are in awe of the centrifugal forces released by the nonconforming minority communities, which may cause the disintegration or destabilisation of the state. Upon close examination, the protected interest is of course, not the state itself, but the dominant forces – usually the ruling majority community in a state. The interests of such a dominant community are fully identified with the state itself and it is precisely the interests of such dominant community that are being served by ‘nation-building’ programmes. Conversely, ‘nation building’ will be inimical towards the nondominant particular communities. The nation and especially the nondominant communities within it are merely the pliable and manipulative instruments that serve the state. *Nation building*, officially inspired under the guidance of the dominant powers in the state, is a mere strategy, a means of attaining an end, namely to entrench the state and the position of the dominant forces that control it. Accordingly, *nation building* employs a strategy that weakens particular communities and ensures that such communities fully reconcile themselves with the state and adopt a state identity, in the interest of the state and its dominant forces, by means of encouragement, propaganda, education and sometimes even by brute force. In Rousseau’s terminology such strategy is aimed at forcing these particular communities to abandon their opposition and conform to the general will. Nation building therefore embodies a fundamental element of the statist paradigm because the protected interest that is served by nation building is the state itself.⁸⁰ Nation building, i.e. state building, targets all those who coincidentally find themselves within the borders of a certain state, irrespective of how arbitrary and authoritarian the determination of its borders may have been, in order to impose a statist identity in conformity with the dictates of the dominant political forces in the state concerned. It imposes a Spanish identity on Catalans and Basques, it forces Croats and Slovenians to be Yugoslavians at all cost, it demands Scots to be British first, it requires Tamils to be Sri Lankan first, Flemings to be Belgian first, Kurds to dissolve themselves into a single Turkish identity and Afrikaners to embrace a primary South African statist identity. This logic of statist identity flows directly from the statist paradigm, for it is indeed one of the inherent characteristics of the territorial state to create a single statist identity and to deny plural identities. Hendrik Spruyt explains this as follows:

Thus the modern state defines the human collectivity in a completely novel way. It defines individuals by spatial markers, regardless of kin, tribal affiliation, or religious beliefs. Individuals are in a sense

⁸⁰ Gagliano (n 10 above) 23-24.

amorphous and undifferentiated entities who are given an identity simply by their location in a particular area. Thus one must make Aquitanians, Normans, and Bretons into French people.⁸¹

Jan Gagliano's explanation is therefore correct when he asserts:

State nationalism imposes nationhood on any given subject population eventually included in the national boundaries.⁸²

All the communities forced to assimilate into larger entities, are in fact told to forsake themselves and to dissolve their own identity for the sake of a 'greater' statist identity, which has to be entrenched at all cost in the interest of the state and its reigning powers. It is precisely for that reason that Walker Connor declares:

The one man's nation building is another man's subjugation — or one man's nation building another's nation disintegration.⁸³

It is especially in the erstwhile colonial territories of Africa, including South Africa, where the former colonial masters had demarcated state frontiers in an arbitrary way without even considering demographic realities,⁸⁴ that nation building brings about the destruction of linguistic and ethnic communities — the destruction of nations. In these territories, groups were artificially forced into the same political entities without any prior consultation, simply to satisfy the political aspirations of the colonial powers at the time. Walker Connor thus correctly summarises the sombre reality when he asserts:

Since most of the less developed states contain a number of nations and since the transfer of primary allegiance from these nations to the state is generally considered the *sine qua non* of successful integration, the true goal is not 'nation building' but 'nation destroying'.⁸⁵

The nation builders are therefore nation destroyers and the intellectual activity developed to support it, pursues a destructive ideal.

Nation-building projects are conspicuously antidemocratic because they are undertaken without the consent of those segments of the state population who are most harshly being subjected to it. It is the enterprise of a reigning political elite, centrally driven and

⁸¹ H Spruyt *The sovereign state and its competitors: An analysis of systems change* (1994) 34-5.

⁸² Gagliano (n 10 above) 24.

⁸³ W Connor 'Nation building or Nations-destroying' (1971-72) 24 *World Politics* 336.

⁸⁴ See in particular Makua wa Mutua (n 7 above) 1113-1176.

⁸⁵ Makua wa Mutua (n 7 above) 1113-1176.

imposed upon all and sundry.⁸⁶ This is witnessed by Jacobinism, Bolshevism, National-Socialism, Falangism and a great number of other contemporary nation-building projects.

Upon close examination, nation building strives to accomplish the synchronisation of state and nation, and of ensuring that the state will assume and reflect the character of the dominant grouping within its borders. The state authority imposes the acceptance of such dominant character upon nondominant groupings — usually minorities. The opposite of nation building is a democratic culture in terms of which a civil society, characterised by plurality, is kept intact instead of imposing a statist identity through absorbing everybody into the state nation.⁸⁷ The famous Afrikaans political philosopher, Johan Degenaar, accordingly suggests that South Africa should not waste time on trying to build a nation, but should rather accept joint responsibility for cultivating a democratic culture.⁸⁸ That will, among others, assist in preventing a totalitarian order and a dominant monolithic state structure.⁸⁹

From the liberal point of view — and in particular from the stance of the protagonists of classic liberalism, like John Stuart Mill, Alexis de Tocqueville and Lord Acton — nation-building projects are incisively critiqued. Although the concept of nation building admittedly did not yet exist at the time, totalitarianism, majority domination and a loathing of pluralism — all sharing in the same genetic pool of nation building — were well known. In fact, many of the philosophical works of the above-mentioned three gentlemen touched upon this subject.

Liberalism is normally associated with the notion of individual freedom, but as Chandran Kukathas⁹⁰ points out, in its widest sense liberalism is fundamentally a theory that supports pluralism and multiculturalism. In his opinion, liberalism provides the most satisfying explanation of the reality of moral, religious and cultural diversity.⁹¹

⁸⁶ Gagiano (n 10 above) 22.

⁸⁷ Degenaar (n 10 above) 9-15.

⁸⁸ Degenaar (n 10 above) 15.

⁸⁹ I Young 'Polity and group difference: a critique of the ideal of universal citizenship' (1989-1990) 99 *Ethics* 258 argues in the same manner for the recognition of a plural and differentiated public and of heterogeneous citizenship. That would serve as an antidote against the homogeneous tyranny imposed on the entire state population by a dominant group.

⁹⁰ C Kukathas 'Liberalism and multiculturalism: The politics of difference' (1998) 26 *Political Theory* 686 *et seq.*

⁹¹ See also in general W Kymlicka *Liberalism, Community and Culture* (1989) who regards pluralism and its concomitant protection of minorities as basic components of liberal theory, as well as GB Levy 'Equality, autonomy and cultural rights' (1997) 25 *Political Theory* 215-248, whose opinion in this respect is similar.

To Mill's mind the tyranny of the majority, which lies at the root of nation-building projects and democratic totalitarianism, as explained earlier, poses a fundamental threat to individual freedom. He explains:

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.⁹²

Consequently Mill argued that although it is imperative to institute measures against the abuse of power by political functionaries, such measures are insufficient. Reigning public opinion – the dominant opinion – has a tyrannical effect, because of its imposition on dissidents. For that reason it is imperative to also provide protection against that:

There is a limit to the legitimate interference of collective opinion with individual opinion and individual independence; and to find that limit and to maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism.⁹³

For Lord Acton,⁹⁴ the apprehension for the tyranny of the majority is even more profound than it is for Mill. He also shows a greater appreciation than Mill for pluralism and for the convictions of the minorities.

The single greatest evil caused by (unrefined forms of) democracy, is the promotion of tyranny imposed by the majority, which will be discussed in more detail in chapter 7.⁹⁵ For that reason he argued that the best measure for determining whether a country is really free, is the degree of protection that minorities enjoy,⁹⁶ which also implies an aversion to state-building projects. Lord Acton found domination by the majority even more loathsome than domination by a minority and stressed the need for protection of minorities when he declares:

It is bad to be oppressed by a minority, but it is worse to be oppressed by a majority. For there is a reserve of latent power in the masses which, if it is called into play, the minority can seldom resist. But from the

⁹² JS Mill *On Liberty* (1986) 10-11.

⁹³ Mill (n 92 above) 11.

⁹⁴ See for example GP Gooch 'Lord Acton: Apostle of liberty' (1946-1947) 25 *Foreign Affairs* 629.

⁹⁵ JN Figgis & RV Laurence (eds) 'Sir Erskine May's Democracy in Europe' in Lord JEED Acton *The History of Freedom and Other Essays* (1907) 97. (The work contains a synopsis of Lord Acton's essays.)

⁹⁶ Figgis and Laurence (n 95 above) 4.

absolute will of the entire people there is no appeal, no redemption, no refuge but treason.⁹⁷

The most sagacious criticism of the majority will and the tyranny of the majority (and state building), and the most comprehensive early liberal apology for pluralism came, however, from French liberals like Prosper de Barante, Guizot, Royer-Collard, Madame De Stael and of course, from De Tocqueville.⁹⁸

The main theme for discussion by the French liberals of the 1820s was that the French Revolution finally merely produced the *state*, on the one hand, against *atomised individuals* on the other, as the interdependent constituent components of the public order. It failed in particular to grant meaningful recognition to intermediary institutions and associations that lie between these two extremes.⁹⁹ The contract theory, which was a legacy of the seventeenth century, with its emphasis on the *natural individual*, would ultimately give rise to a new Leviathan. As there were no intermediary communities and structures, individuals were progressively exposed to this new Leviathan in two ways. First of all, due to the lack of any cushioning effect of intermediary communities, they stood fully exposed to the coercive state. Secondly, due to a lack of support normally provided by intermediary communities, they became increasingly dependent on the state.

Experimenting with local autonomy and federalism as antidotes against the unduly centralistic state was the order of the day among these liberals.¹⁰⁰

Tocqueville was the pioneering scholar in the field of plural democracy and against nation-building projects. He was inspired by American federalism, yet at the same time, he was also fully aware of the tyranny of the French Revolution, through which equality and uniformity had been imposed on everybody¹⁰¹ and through which all people had become mere powerless individuals in the face of the powerful state. Tocqueville argued that state sovereignty advocated by Bodin and Hobbes had achieved its object. It suppressed centrifugal forces and in doing so ensured peace and stability. According to him, however, it became dysfunctional during his times, as clearly demonstrated by the extravagant centralism of the French Revolution.¹⁰²

⁹⁷ Figgis and Laurence (n 95 above) 11.

⁹⁸ See in general, EK Bramsted & KJ Melhuish *Western Liberalism: A History of documents from Locke to Croce* (1978); L Siedentop *Tocqueville* (1993) 20-40.

⁹⁹ Siedentop (n 98 above) 26.

¹⁰⁰ Siedentop (n 98 above) 20-40.

¹⁰¹ Siedentop (n 98 above) 58-59.

¹⁰² Siedentop (n 98 above) 41.

In conformity with the basic premises of liberalism, Tocqueville also regarded the basic distinction between the private and public domains as important. Consequently, caution should be displayed so as not to allow the appeal to republican virtue, as propagated by Rousseau, to degenerate into a civic discipline too deeply encroached into the private domain.¹⁰³ Tocqueville, however, progressed beyond the other liberals who were merely intent on indemnifying the private domain against violations committed by the central authorities. He was a republican himself, who endeavoured to salvage the virtuous elements of Rousseau's republicanism. Republican civic virtues can, however, only be pursued in a plural dispensation and not in a comprehensive territorial state – like France at the time.¹⁰⁴ The vast territorial state with its strong centralised authority can never succeed to be a genuine *res publica*, for it is simply so far removed from its citizenry that the citizens are not really able to enter into any meaningful association with it. Republicanism required smaller and closer-knit political units with which citizens can actively associate and assert themselves.

In this respect Tocqueville is much closer to Rousseau – who actually consistently prescribed a restricted political unit as a requirement of his republicanism – than the statist exponents of Rousseau, like Sieyès and Robespierre.

Tocqueville's major concern, caused by the way in which he had experienced the French Revolution, was that the emasculation of active citizenship could give rise to a fully privatist way of life which could ultimately lead to absolute individual atomism. Such a state of affairs will inevitably cause the malaise of an unduly centralistic bureaucracy.¹⁰⁵ Tocqueville's cure for this was to simultaneously oppose both centralism and privatism. That is done by stimulating the intermediary associations that fall in between the individual and the state, in which the republican values of civic political involvement and participation can be cultivated.¹⁰⁶

The intrinsic flaw detected by Tocqueville in the democracy of the territorial state at the time, is the fact that it relies on the principle of civic equality and homogeneity, which provide no antidote against the development of undue centralisation and an excessive state, and against an abuse of power.¹⁰⁷ Such antidote can only be provided by intermediary communities and structures that fall in between government and the individual. Such communities and structures

¹⁰³ Siedentop (n 98 above) 63.

¹⁰⁴ Siedentop (n 98 above) 67-68.

¹⁰⁵ Siedentop (n 98 above) 139.

¹⁰⁶ Siedentop (n 98 above) 139-140.

¹⁰⁷ Siedentop (n 98 above) 140.

empower individuals because they amass people in groups, which has the simultaneous effect of checking the excessive control and centralisation of the state.

The absence of intermediary communities gives rise to a related malady detected by Tocqueville in the democracy of his times,¹⁰⁸ namely the repressing effect of a majoritarian democracy. The fact that a certain point of view is enjoying wide support causes people, who feel intimidated without any justification for experiencing such feeling, to draw the conclusion that such point of view must be correct. It undermines the integrity of rational argumentation and has the effect – as formulated by Larry Siedentop – that:

... moral and intellectual enfeeblement may result from individual judgment abdicating in the face of public opinion.¹⁰⁹

Formal equality and the absence of intermediary associations, which provide people with a shield against the power of the majority, force dissenting minorities to subjugate themselves to public opinion,

... resulting not in independence of judgment but conformity, a pandering of opinions because they are widely shared.¹¹⁰

According to Siedentop the cure for this is also to be found in pluralism and intermediary associations:

For by associating and discovering others who share an opinion, individuals acquire greater confidence in their own judgments.¹¹¹

In local republicanism and the pursuit of civic virtues at a local level, Tocqueville did not only discover a technique, but also a new morality – a morality that offers assistance against the tyrannical effects of majority compulsion and intimidation, and against centralised bureaucratic dictates.¹¹²

Consequently, plurality is an imperative quality for ensuring freedom, while at the same time it is impossible to attain individual freedom without the protection of the integrity of groups. A democratic society that is serious about preserving freedom, should afford preference to the maintenance of groups. Nation building, which by contrast, is hostile towards maintaining groups, is finally also the enemy of individual freedom. Degenaar is therefore correct when he asserts:

¹⁰⁸ In this respect Acton clearly benefited from Tocqueville's work.

¹⁰⁹ Siedentop (n 98 above) 81.

¹¹⁰ Siedentop (n 98 above) 82.

¹¹¹ Siedentop (n 98 above) 82.

¹¹² Siedentop (n 98 above) 64.

The plurality of associations should be maintained as effective structuring of freedom acted and as counter-measure to any form of totalitarianism. An open and plural society is precisely one in which the existence of bargaining power of a variety of associations are accepted and protected.¹¹³

3 More subtle forms of nation building

Nation building branches into less crude and more varied forms. Besides Jacobin nation building, one will also encounter strategies of constitutional¹¹⁴ and pluralistic nation building.¹¹⁵ Constitutional nation building rests on a shared loyalty towards the constitution, especially a constitution that also provides for the protection of individual rights. This finds expression, among others, in what is normally referred to as constitutional patriotism. It functions *inter alia* by relying on the assumption that ethnic minorities will eventually put up with assimilation with the majority, provided that the courts will grant protection to some of the minority rights.¹¹⁶

The aims of pluralistic nation building are even more modest. Although it does not abandon the ideal of creating a nation for the state, it relinquishes the coercive measures for nation building according to the Jacobin pattern.¹¹⁷ The strategy continues to retain the goal of advancing loyalty towards the state, but instead of attaining it by coercion, it is being advanced by means of measures aimed at accommodating groups (accommodating measures). It is, as it were, a benign nation-building strategy, which exchanges the hurting rod of Jacobinism for a tasty carrot. The strategy makes provision *inter alia* for power-sharing mechanisms and for the protection of minorities.¹¹⁸ The growing recognition of minority rights over the last decade affords good evidence of the growing attractiveness of this strategy.¹¹⁹

These two sophisticated nation-building strategies show marked differences from their brutal Jacobin ancestor. In the first place, it lacks the totalitarianism of Jacobinism. It does not invade civil society and private lives so intensely and so explicitly. These sophisticated

¹¹³ JJ Degenaar 'Pluralism' in DJ van Vuuren & DJ Kriek (eds) *Political Alternatives for Southern Africa: Principles and Perspectives* (1983) 86. See further in this respect the thorough discussion of B Zylstra *From Pluralism to Collectivism – The development of Harold Laski's political thought* (1970).

¹¹⁴ Giliomee (n 11 above) 68-69.

¹¹⁵ Giliomee (n 11 above) 74-78.

¹¹⁶ Giliomee (n 11 above) 68.

¹¹⁷ Giliomee (n 11 above) 75.

¹¹⁸ Giliomee (n 11 above) 76.

¹¹⁹ On this, see for example HA Strydom 'South African constitutionalism between unity and diversity: lessons from the new Europe' (1997) 12 *SA Public Law* 373 *et seq.*

forms of nation building also differ from Jacobin nation building, because they do not explicitly enforce statist identity, do not have an intimate individual effect and are not actively trying to alter individual identities in a fundamental way.

These are the differences between Jacobin and sophisticated nation building. However, there are also striking similarities. In terms of both Jacobin and sophisticated nation building, public (political) identity is still reserved for the state. Although sophisticated nation building makes allowance for private diversity and will probably also provide for its constitutional protection, it also closely guards the monopoly of the territorial state over the public political domain. Indeed, AE Galeotti is patently correct by asserting that:

... whereas citizens are free to pursue their own ideals and to practice their culture within civil society, in the public sphere they should disregard their special and particular memberships and be 'just citizens' on an equal basis.¹²⁰

This can be ascribed to the apprehension – in existence since Bodin's times – that as soon as a particular group identity establishes its influence in the formation of the basic character of the state, it will unchain a new conflict with regard to the nature of the state.¹²¹

Nation building of whichever nature falls squarely within the statist paradigm. It is the most typical politico-intellectual conceptual strategy in favour of entrenchment of the existing territorial state. Accordingly nation building continues to safeguard the monopoly of state citizenship as the sole form of public identity. It excludes the claims of all other identities and ensures that such other identities will remain in the shadows of the private sphere. All nation building projects feed statist identity: the Jacobins achieved it by means of acrimonious coercive measures, whereas sophisticated nation-building achieves the same by employing the sweet taste of private accommodation. Both are authentic state-building strategies. They put the state first and subject individuals and especially communities to the interests of the state. Accepting the state as the fixed point of departure, they bend and manipulate individuals and groups to be subservient to the state. In the process of nation building the Hobbesian Leviathan – the mortal god – abandoned his former solitary and aloof position. Nation building satisfied the mortal god's yearning for worshippers. Nation building confirmed that the people are there for the state, and not the state for the people.

¹²⁰ AE Galeotti 'Citizenship and Equality: The place for toleration' (1993) 21 *Political Theory* 591.

¹²¹ Kukathas (n 90 above) 692-693.

4 Legal reasoning behind state building

The need to entrench the state in terms of the premises that underlie nation building, is widely and profoundly reflected in legal theory and practice. As explained in chapter 5, one of the typical characteristics of legal science is the fact that it is an applied science. One of its characteristics is to operate in terms of a certain paradigm, without even being aware of the existence of such paradigm. Even to a greater extent than in respect of legal thought and legal science, one encounters the same phenomenon in legal practice. This has the effect that legal theory and practice, in conformity with the statist paradigm, inadvertently tend to serve the existing statist order and statist identity as expressed in nation-building programmes. In practical terms this entails that such legal theory and practice are not merely operating within the confines of the strict disciplines of a paradigm, but are at the same time defending an ideology by vesting it with legal authority. This is a widespread phenomenon and even the most respected modern scholars are sometimes its (quite uncritical) exponents. As an illustration of this, the thought of John Rawls and Ronald Dworkin will be discussed next. In the context of legal practice, we shall focus on nation building as reflected in South African case law, which is in similar fashion firmly anchored in the premises of the statist paradigm.

4.1 John Rawls

John Rawls' magnum opus, *A Theory of Justice*,¹²² has gained universal recognition as the leading modern formulation of liberal political and legal theory. Furthermore, Rawls is arguably also an authentic exponent of the statist paradigm. True to the premises of that paradigm, developed since its earliest appearance in the works of Jean Bodin, Rawls reserves the public political domain for the state and the individual citizen, whereas all other entities and groupings are strictly confined within the limits of the private domain. In this way Rawls also acts as a state builder. Rawls constructs his state nation in accordance with the sophisticated¹²³ pattern of nation building discussed earlier.

Following the publication of his main work, Rawls constantly had to endure criticism, in particular from communitarian scholars like Michael Sandel, Charles Taylor, Alisdair MacIntyre, Michael Walzer¹²⁴

¹²² J Rawls *A Theory of Justice* (1971).

¹²³ Or, as Giliomee respectively refers to it, the liberal-democratic and the constitutional patterns of nation building. See Giliomee (n 11 above) 68, 69.

¹²⁴ For a useful summary of all the criticism see S Mulhall & A Swift *Liberals and Communitarians* (1992) 37-164.

and Vernon van Dyke. In addition to explaining his assumptions, this forced Rawls to modify and further refine them in a number of articles.¹²⁵ In these later works in particular, the nation-building tendencies reflected in his theory become clearly apparent.

In Rawls' work we encounter a modern version of the social-contract theory, used as a tool in designing a model of political justice. The conclusion of the agreement takes place in what Rawls calls the *original position*. In this state, circumstances should be such that they will provide the ideal setting for constituting a permanent state of political justice.¹²⁶ This state of affairs is created by covering everybody involved in the conclusion of the agreement with a *veil of ignorance* regarding their own identity, position and convictions while the agreement is being concluded. All people are completely ignorant with regard to their identities following the conclusion of the agreement, where they would socially and economically fit into society and also what their views and convictions would be. In the original position, the veil of ignorance has the effect of creating a state of full equality (and freedom). Everybody is in danger of finding themselves in the worst and most disadvantageous position after the veil has been lifted. Every rational person — and Rawls' ostensible rationalistic model automatically implies that all people will go about their affairs rationally in respect of managing their personal affairs — will therefore enter into the agreement in such a way as to make provision for the weakest and least privileged, simply because every contracting party stands to be in the weakest position after conclusion of the agreement. In such a way a rationally based legal order will be assured. Due to the effect of the veil of ignorance, the contract that underlies the legal order will be concluded on the basis of total unanimity, since everyone entered into it in a state of equality.

The contract only provides for the most basic minimum legal principles. It explicitly does not contain any stipulations affording preference to a specific religion, ideological code, ethnic group or similar matter. The reason for this can be ascribed to the fact that the contracting parties — covered by the veil of ignorance — appreciate the risk of discovering after the conclusion of the agreement (and the removal of the veil of ignorance), that they belong to a nondominant religious group, adhere to a nondominant ideology or are members of a nondominant ethnic or cultural group. The ignorance that accompanies the original position therefore ensures absolute

¹²⁵ (a) See J Rawls 'Justice as fairness: political not metaphysical' (1985) 14 *Philosophy and Public Affairs* 223-251; (b) J Rawls 'The idea of overlapping consensus' (1987) 7 *Oxford Journal of Legal Studies* 1-25; (c) J Rawls 'The priority of the right and ideas of the good' (1988) 17 *Philosophy and Public Affairs* 251-276; (d) J Rawls 'The domain of the political and overlapping Consensus' (1989) 64 *New York University Law Review* 233-255.

¹²⁶ Rawls (n 125a above) 234-239.

neutrality of the state and the ensuing legal principles. The original position guarantees a state providing for the basic equal treatment of all individuals (and groups) but not affording any official recognition to any ideological, religious, moral, or any other particular code or view.

The person in the original position is the universal individual and the ordinary state citizen: the common American, or the common South African. He or she is not a particular American, like an Afro-American, a WASP or an Hispanic; nor a *particular* South African, like a Black man, Zulu, Muslim, or Afrikaner. The rationality that supports the process of entering into the agreement in the original position is therefore a general individual rationality, i.e. a general 'neutral' rationality of state citizenship. Consequently the statist legal order is also a product of such rationality of state citizenship. Therefore, only the interests of the individual common citizen will be embodied in the public order and legally accounted for. Particular identities and preferences may not be reflected in the public domain and may also not receive any legal recognition whatsoever. If that were to happen, the state could take on a particular and biased identity, which might be inimical to other particular identities and could therefore bedevil the internal cohesion of the state.

Rawls continuously draws a clear distinction between the private and public political domains. His model of justice takes into account only those things that are common to all individual citizens. His model also places a restriction on the legal recognition of any particular ideological belief, value, identity or any other conception of what is good and virtuous. This restriction, however, only applies to the public domain. Rawls therefore, did not develop a broad moral doctrine, but merely a political conception of justice that applies to the public domain.¹²⁷ It is quite in order for individuals and communities to make choices in respect of that which is good, right and valuable, but such choices may only obtain in the private domain. The coercion of state authority may never be harnessed to impose those choices on dissentients. The state may only impose the legal principles on which there is agreement (which agreement was reached when the contract was concluded in the original position) and that protects everybody's right to freedom of choice. State authority may never be harnessed to impose any convictions in respect of the good, of values and of particular identities, for there can never be any agreement on those things.¹²⁸

¹²⁷ See Rawls (n 125a above) 224-225 and Rawls (n 125d above) 248.

¹²⁸ Rawls regards the plurality of the modern state as an established fact and declares that there is no point in officially trying to impose particular views of the good. See for example Rawls (n 125d above) 234-235.

Associations may be formed beyond the public domain on the basis of a common conception of the good. This can be done because such associations are based on the exercise of freedom of choice. A person is free to associate himself with the disciplines of such associations and to disassociate himself whenever he may choose to do so. However, political, or, more correctly state society, is not based on free identification and thus cannot be based on (particular) enforceable conceptions of the good. Should that happen, it might give rise to unjustifiable coercive measures aimed at those who dissent from the dominant concept of the good:

... the political power exercised within the political relationship is always coercive power backed by the state's machinery for enforcing its laws. In a constitutional regime political power is also the power of equal citizens as a collective body. It is regularly imposed on citizens as individuals, some of whom may not accept the reasons widely thought to justify the general structure of political authority (the constitution), some of whom accept that structure, but do not regard as well grounded many of the statutes and other laws to which they are subject.

Political liberalism, then, holds, that there is a special domain of the political identified by at least these features. So understood, the political is distinct from the associational, which is voluntary in ways the political is not; it is also distinct from the personal and the familial, which are affectional domains, again in ways the political is not.¹²⁹

Rawls' conception of justice thus obtains only in the political sphere, the sphere which he terms the *basic structure*.¹³⁰ This model does not apply to the domain of associations operating on the basic principle of free identification. Therefore, we are in fact dealing here with a *political* conception of justice, and not with general moral philosophy. Rawls continuously focuses on the concept of political justice. An additional question, closely associated with this theme, is that of the *modus vivendi*¹³¹ that is to be followed to safeguard the survival of the plural state. To be frank, Rawls is not only a philosopher of justice, but at the same time also a political or – more correctly – a statist strategist. He is not only interested in assuring public justice, but also in accomplishing the cohesion and survival of the state in its present form.

Rawls' theory is evidently well anchored in the historical roots of (political) liberalism and he is fully aware of the fact that the plural

¹²⁹ Rawls (n 125d above) 242.

¹³⁰ Rawls (n 125d above) 240; Rawls (n 125b above) 3 *et seq*; Rawls (n 125a above) 224-225.

¹³¹ *Modus vivendi* is the phrase employed by Rawls to describe the strategic effect of his theory for the protection and maintenance of the existing state. See for example Rawls (n 125c above); 274; Rawls (n 125b above) 9; Rawls (n 125a above) 247.

state is dependent on the maintenance of tolerance. He expressly fell into line with this tradition, dating back to the era when Bodin and Hobbes established the statist paradigm.¹³² He therefore argues:

Now one reason for focusing directly on a political conception for the basic structure is that, as a practical political matter, no general and comprehensive view can provide a publicly acceptable basis for a political conception of justice. The social and historical conditions of modern democratic regimes have their origin in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration, and in the growth of constitutional government and of large industrial market economies. These conditions profoundly affect the requirements of a workable conception of justice: among other things, such a conception must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable conceptions of the meaning, value and purpose of human life (or what I shall call for short, 'conceptions of the good') affirmed by the citizens of democratic societies.¹³³

Rawls declares that the continued existence of the state, which depends on popular support,¹³⁴ has to be founded upon a political conception of justice:

Since we are concerned with securing the stability of a constitutional regime, and wish to achieve free and willing agreement on a political conception of justice that establishes at least the constitutional essentials, we must find another basis of agreement than that of a general and comprehensive doctrine. And so, as this alternative basis, we look for a political conception of justice that might be supported by an overlapping consensus.¹³⁵

Rawls' concept of a constitutional regime is based on a general consensus that could be obtained in respect of legal principles, despite deep-seated divisions in a plural society. However, such pluralism never becomes a political issue, because disagreements are excluded from the public political sphere. Just like the pluralism of his liberal predecessors within the statist paradigm, Rawls' pluralism is a private pluralism. Private identities remain at home, as it were; they are never tolerated within the public domain. In the public domain people do not associate on the basis of their particular identities, but merely as individual citizens. For the purposes of the public domain, people have but a single identity, namely that of state citizens. Other identities, convictions and associations, of whatever fundamental importance to the individuals concerned, remain firmly within the private domain:

¹³² See the detailed discussion on this topic in chapter 4.

¹³³ Rawls (n 125b above) 4; Rawls (n 125a above) 245, 249.

¹³⁴ Rawls (n 125a above) 235.

¹³⁵ Rawls (n 125b above) 4-5.

They may regard it as simply unthinkable to view themselves apart from certain religious, philosophical and moral convictions or from certain enduring attachments and loyalties. These convictions and attachments form part of what we may call their non-public identity ...¹³⁶

Therefore, only the identity of common citizenship qualifies for the purposes of the public political sphere. Only the common denominator – for example American or South African citizens – is allowed in this domain, and never the particular Afro-American, Roman Catholic, Muslim or Afrikaner.

Rawls' political concept of justice, accompanied by all its claims to neutrality, also functions as a political strategy. It prohibits any political manifestation of any particular identity, which may possibly cause pressure to bear upon the present order and which aims at transforming the existing statist order.

When he tells us about the political philosopher's task, Rawls reveals himself to be a state-builder – in other words, the apologist and defender of the existing territorial statist order. It is the political philosopher's function to manipulate particular views and identities to such an extent that the common aspects are emphasised, while the differences are sidelined in order to build a public consensus and accordingly constrict the spectrum of public disagreement.¹³⁷

On close examination, Rawls' political concept of justice is based on a society functioning on the basis of the common realisation that mutual association does not form part of the modern territorial state, as well as the assumption that the arbitrary determination of the borders of the territorial states, which caused diverse groups to be enclosed in a single state, is an invariable and permanent premise; that nothing can and should be done with regard to such arbitrary state of affairs, despite the fact that the existing statist order, by means of its particular way of determining borders, has ignored cultural, ethical, religious, linguistic and other similar ties. Rawls is therefore not critical of the territorial state in its present order. He simply regards it uncritically, as if it were an immutable self-evident premise, as if it had one day simply dropped down from heaven – as a *kind of happening*, as Vernon van Dyke put it¹³⁸ – and with that it's over and done with.

This type of state, without a nation, without a community, without a common identity or common conception of the good, is the raw material of Rawls' model of political justice.

¹³⁶ Rawls (n 125a above) 241.

¹³⁷ Rawls (n 125a above) 230.

¹³⁸ V Van Dyke 'The individual the state and ethnic communities in political theory' (1976-77) 29 *World Politics* 348.

In this statist order, unanimity exists in respect of a single matter only, namely the need for legal principles that will further the interests of all individual citizens. As citizens will eventually come to realise that the liberal state is an obliging state, they should gradually grow more loyal towards it.¹³⁹

This independent allegiance in turn leads people, to act with evident intention in accordance with liberal arrangements since they have reasonable assurance (founded on past experience) that other will also comply with them. So gradually over time, as the success of political co-operation continues, citizens come to have increasing trust and confidence in one another.¹⁴⁰

Rawls' intention was to cultivate and nurture a common identity of statist citizenship within the given reality of the territorial state, in order to reinforce the mutual cohesion among its citizens and to accomplish the permanent stability of the statist order. Amongst other things, Rawls is also the eminent statesman with a state-building project that was designed to maintain the existing order well into the future:

Some may think that to secure stable social unity in a constitutional regime by looking for an overlapping consensus detaches political philosophy from philosophy and makes it into politics. Yes and no: the politician, we say, looks at the next election, the statesman to the next generation, and philosophy to the indefinite future. Philosophy sees the political world as an on-going system of cooperation over time, in perpetuity practically speaking. Political philosophy is related to politics because it must be concerned, as moral philosophy need not be, with practical political possibilities. This has led us to outline for example, how it is possible for the deep divisions present in a pluralistic society to be reconciled through a political conception of justice that gradually over generations becomes the locus of an overlapping consensus. Moreover, this concern with the practical possibilities compels political philosophy to consider fundamental institutional questions and the assumptions of a reasonable moral psychology.¹⁴¹

From a communitarian perspective there is a growing insistence on the recognition of rights differentiated on the basis of existing groups. Furthermore, persuasive arguments are being levelled against the constricted identity of statist citizenship. Iris Young argues in favour of the recognition of group-differentiated citizenship and a heterogeneous public, against the generalised identity of statist citizenship.¹⁴² In accordance with this view, differences in the public domain should be recognised instead of being relegated to the private

¹³⁹ Rawls (n 125b above) 21-22.

¹⁴⁰ Rawls (n 125b above) 23.

¹⁴¹ Rawls (n 125b above) 24.

¹⁴² Young (n 89 above) 257-258.

domain. In addition, it is accepted that the differences cannot be eliminated and there are efforts to accommodate differences within the public domain.¹⁴³ General statist citizenship, which implies that all rules apply to everybody, pretends neither to take groups into account, nor to afford preference to any particular values or identities. Young rejects any such claim of neutrality and impartiality. She explains that universal rules fail to take minority experiences and interests into account, thus reducing such minorities to second-class citizens. With the specific aim of addressing these inequalities towards minorities, there is a demand for the recognition of differentiated citizenship. In terms of this demand, all experiences, particularly those of nondominant minorities, must be accommodated within the public domain.¹⁴⁴

Rawls' model of political justice is, despite all the claims in respect of its neutrality, a biased model because it ignores the particular identities and interests of minorities.¹⁴⁵ This occurs because the *original position*, which occupies the centre stage in Rawls' system, is epistemologically defective. This defect must be ascribed to the fact Rawls and his kindred spirits did not belong to minority groups and could thus not speak on behalf of minorities, nor could they succeed in designing a model of justice that makes provision for minority experiences and interests. Minority experiences are thus not represented in the original position and cannot be a joint determinant of his notion of justice. Scholars like Rawls simply cannot succeed in articulating the particular needs and interests of minorities from a minority perspective because they do not belong to minority groups. A distortion of communication thus occurs in an effort to design a theoretical model of justice. The scholar speaks for the person he views to be the universal citizen and endeavours to design a lasting conception of justice. During this process the real identities and situations of a large number of people from backgrounds, cultures and social contexts that differ from those of the scholar, are never revealed and play no part in the construction of the model of justice. The scholar is simply unable to account for those particular experiences and situations and he therefore has no concrete mandate to express himself on such matters. Accordingly he will fail in any attempt to accommodate such groups in his model of justice.¹⁴⁶

¹⁴³ Young (n 89 above) 258.

¹⁴⁴ Young (n 89 above) 250 *et seq.*

¹⁴⁵ See the discussion by MS Williams 'Justice towards groups' (1995) 23 *Political Theory* 75 *et seq* of observing social differences as a requirement for justice in any political dispensation.

¹⁴⁶ Williams (n 145 above) 78.

... we should not suppose that we as individuals toiling away in the cloistered halls of academe, can construct principles of justice that anticipate standpoints of all relevant others.¹⁴⁷

It is impossible to design a procedure for a general model of justice without it ultimately reflecting the own identity and social position of the system's designer. Such an exercise will therefore always be doomed to failure. The only achievable alternative for maintaining justice is the continuous participation by all, including marginalised minorities. Law creation should thus not occur outside of and prior to the political process, but on a continuous basis within the political discourse in which all interests must be *directly* articulated by the interested parties themselves,¹⁴⁸ and not by a virtual philosophical *agent* who will never be able to speak on everyone's behalf.

Rawls is the philosopher dealing with justice within the statist paradigm. The existing order of the territorial state is his point of departure — the obvious *happening* whence he proceeds. He never questions it. He never considers the possibility that the existing order may possibly obstruct the establishment of justice and consistently proceeds from the point of view that justice must be reached within the existing statist order. It is his tacit and unreflected point of departure. His effort to achieve justice ultimately fails for two reasons:

firstly, his unuttered devotion to the existing order of the territorial state and his inability to question the desirability of the statist order as his point of departure; and

secondly, because he ultimately proceeds in an undemocratic way in an effort to accomplish justice. He fails to allow the experiences of marginalised minorities to contribute to the establishment of justice, because he allows only the average rational person (himself) to enter into the contract on the basis of his experiences, interests, needs and identities.

4.2 Nation-building jurisprudence, Ronald Dworkin and legal principles

(a) *Nation-building jurisprudence*

In South African law the *boni mores* concept — the so-called objective reasonableness criterion — plays a crucial role in establishing whether conduct is wrongful (unlawful) or not. As such, the *boni mores*

¹⁴⁷ Williams (n 145 above) 78.

¹⁴⁸ Williams (n 145 above) 79.

perform an important function in the context of the law of obligations (the law of delict and the law of contract), criminal law and family law.¹⁴⁹ It is averred that in a legal context the *boni mores* do not so much have moral significance, but rather a definitive legal significance.¹⁵⁰ It is associated with the legal convictions of society. The presiding judicial officer is the interpreter of such convictions¹⁵¹ and on the strength of these convictions, among other things, he will judge whether conduct is wrongful (unlawful), or whether a potentially polygamous marriage, entered into in terms of Muslim rites, is permissible (and therefore valid) or not.¹⁵²

In South African legal doctrine and practice (and formulated in other terms, in other jurisdictions) the *boni mores* concept performs a useful and important function. It is a flexible criterion that is able to fathom changing views and convictions, thereby contributing to the fair administration of justice. Nevertheless, such a concrete matter as the operation of the *boni mores* criterion in legal practice is also a practical manifestation of the statist paradigm and it unwittingly functions as a state-building strategy.

The difficulty lies in the fact that the *boni mores* are imputed, without grounds, to a supposed South African community, i.e. a statist community. This proceeds from the assumption that South African society constitutes a community and that this statist community subscribes to the same moral and legal conceptions.

On the strength of the assumption that there is indeed a South African community, the court in *Ewels*¹⁵³ refers to the legal convictions of 'the community'. This suggests that a single South African community does in fact exist. Likewise, in *Clarke* there is a reference to '... the legal convictions of our society, its *boni mores* ...'. Again, the court assumes without question that a single and undifferentiated South African community exists.¹⁵⁴ In *Marais* the

¹⁴⁹ See for example *Clarke v Hurst NO and Others* 1992 4 SA 630 (D) 650-653; *Macadamia Finance Ltd en 'n Ander v De Wet en 'n Ander* 1991 4 SA 273 (T) 278-80; *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (1)* 1988 2 SA 230 (W) 537; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Ismail v Ismail* 1983 1 SA 1006 (A) 1026; *Schultz v Butt* 1986 3 SA 667 (A) 679; *Marais v Richard* 1981 1 SA 1157 (A) 1168; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 2 SA 173 (T) 188-189; *Hawker v Life Offices Association of South Africa and Another* 1987 3 SA 772 (K) 781; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 571 (N) 579 *et seq*; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 364.

¹⁵⁰ In this respect see *Ismail v Ismail* (n 149 above) 1025-1026 where a distinction is drawn between morality in the ethic sense and morality in the legal sense.

¹⁵¹ The content of the *boni mores* is proved by way of judicial cognisance – often tacit and unintentional. See for example AJ van Wyk 'Die bewyslas van die *boni mores*' (1975) 38 *Journal of Contemporary Roman-Dutch Law* 386.

¹⁵² See *Ismail v Ismail* (n 149 above) and cases referred to there.

¹⁵³ 1975 3 SA 590 (A) at 597B.

¹⁵⁴ 1992 4 SA 630 (A) at 653B.

assumption of the existence of a general South African community was reinforced in another way. The court declared that the legal convictions of the community vary from one place to the next. Thereupon the court's judgment perfectly followed the statist paradigm by reflecting the view that South African legal convictions differ from those convictions in England and the USA.¹⁵⁵ Such differences follow state borders and it did not occur to the court that differences might occur within a state, along borders that exist among cultural and other types of communities. These judgments were consistently based on the fixed premise of national, or rather a statist, consensus in respect of the *boni mores*. In *Ismail* the court bases its judgment on the same assumption, to substantiate its finding that a potentially polygamous Muslim marriage, entered into in conformity with Muslim rites, is unacceptable and that such unacceptability is binding on all members of our 'society'. The court declared that:

... such a union can be regarded as *contra bonos mores* ... as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society, or as Innes C.J. said in *Seedat's* case at 309, as being fundamentally opposed to our principles and institutions.¹⁵⁶

The general *boni mores* criterion pretends to be an expression of broad national consensus. It can, in fact, have the exact opposite effect, namely to reflect the values and convictions of only the dominant component of statist society, despite its guise of neutral rhetoric. As demonstrated above, the *boni mores* pretends to reflect broad national harmony, but in contrast, actually functions as a hegemonic ideology and strategy. Sectional preferences and aversions present themselves as universal conceptions. Due to the fact that this criterion functions as a reflection of general convictions, it eliminates any possibility of applying other convictions in advance. The general *boni mores*, which are binding on everyone, functions as a strategy in terms of which all other legitimate methods of human expression are deemed of no value and suppressed. It is a mechanism that has the effect of imposing the values of one segment of the population onto another.¹⁵⁷

The advent of a new constitutional dispensation in South Africa that commenced in 1994, has given rise to constitution-based case law and especially case law based on the Bill of Rights. On different occasions, the Constitutional Court – in particular speaking through

¹⁵⁵ 1981 1 SA 1157 (A) at 1168 D-E.

¹⁵⁶ 1983 (1) SA 1006 (A) at 1026B.

¹⁵⁷ K Malan 'Oor die hofnotuleringstaal in die lig van die grondwet en na aanleiding van onlangse regspraak' (1998) *Journal of Contemporary Roman-Dutch Law* 61 304.

Judge Sachs — forcefully endorsed plurality, heterogeneity and tolerance of differences as constitutional values. The court held that the right to differ forms an aspect of the right to equality and expressed the opinion that uniformity and the standardisation of conduct cannot be reconciled with the values of equality that underlie a democratic society.¹⁵⁸ Although not restricted to it, these sentiments were expressed particularly in the context of tolerance towards homosexuals and homosexual relationships.

There is, however, also another line of judgments that reveal the Constitutional Court as a diligent statebuilder and in which the notion of a monolithic state nation was endorsed in various ways. The court not only accepted the existence of a South African nation without question, but repeatedly declared the nation to have common aspirations¹⁵⁹ and ideals,¹⁶⁰ that the nation had committed itself to certain matters¹⁶¹ and that the nation has certain aspirations.¹⁶² According to various dicta of judges of the Constitutional Court, the nation also shares the same communal values.¹⁶³ Furthermore, the nation also has its own ethos — a national ethos¹⁶⁴ — in addition to moral and ethical conceptions. The Court also formulated it alternatively, stating that the nation is moving in a moral and ethical direction.¹⁶⁵ The nation has a collective conception of justice¹⁶⁶ and,

¹⁵⁸ *Minister of Home Affairs and Another v Fourie and Another* 2006 3 BCLR 305 (CC) para 60 379E-G para 94 391C-D; para 95 391H-392A; *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC) para 24 1063A-C; *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1998 12 BCLR 1517 (CC) para 132 1574H-1575A; para 134 1576A-C; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 12 BCLR 1399 (CC) 1472C-D.

¹⁵⁹ *Didcott J in S v Makwanyane* 1995 6 BCLR 665 (CC) para 7403J; *Mahomed J in Makwanyane* para 262 758B-D; *Ngcobo J in Kaunda and Others v President of the Republic of South Africa and Others* 2004 10 BCLR 1009 (CC) para 155 1048F; *Mokgoro J in Jaftha v Schoeman and Others and Van Rooyen v Stoltz and Others* 2005 1 BCLR 78 (CC) para 28 90 B-C; *Sachs J in Matatiele Municipality and Others v President of the RSA and Others* 2006 5 BCLR 622 (CC) para 97 622I; *Mokgoro J in Jaftha* para 28 90D.

¹⁶⁰ *Sachs J in Matatiele Municipality* (n 159 above) para 97 852I-853.

¹⁶¹ *Didcott J in S v Makwanyane* (n 159 above) para 190 740I-J; *Chaskalson CJ in Kaunda* (n 159 above) para 60 1026F; *Ngcobo J also in Kaunda* (n 159 above) para 156 1048G-H and para 159 1049D-E; *Ngcobo J in Bato Star Fishing (Pty) Ltd v Minister of Environment and Tourism* 2004 7 BCLR 687 (CC) para 106 730E-F.

¹⁶² *Langa J in S v Makwanyane* (n 159 above) para 227 752F-G.

¹⁶³ *Ngcobo J in Kaunda* (n 159 above) para 1551048F, *Mokgoro J in Jaftha* (n 159 above) para 28 90E.

¹⁶⁴ *Mahomed J in S v Makwanyane* (n 159 above) para 262 758A-B; para 263 758I-J; *Ngcobo J in Kaunda* (n 159 above) para 155 1048F-G; *Sachs J in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 1 BCLR 1 (CC) para 625 183D; *Sachs J in Doctors for Life* (n 158 above) para 1470A-B; *Mokgoro J in Jaftha* (n 159 above) para 28 90D.

¹⁶⁵ *Mahomed J in S v Makwanyane* (n 159 above) para 262 758A-B; *Ngcobo J in Kaunda* (n 159 above) para 155 1048F-G.

¹⁶⁶ *Sachs J in S v Makwanyane* (n 159 above) para 362 785A-B.

in the final instance, it also has a soul.¹⁶⁷

Irrespective of whether a South African nation indeed exists or not, the Constitutional Court judges endorsed the existence of a monolithic South African state nation in almost passionate terms in these dicta. According to the statements referred to, the state nation possesses the character of a living organism and of one individual moral agent. For that very reason an ethos can be ascribed to the nation and it can have certain characteristics, entertain values, moral and ethical convictions and conceptions, as well as a notion of justice. As a single moral agent, the state nation is naturally also able to form its own general will. It can therefore have aspirations, pursuits and ideals, and for that reason it can commit itself to certain goals and move in a specific direction. The elevated nature of the nation also entails that it has a soul, apart from its moral characteristics and its ability to form its own will. One can hardly escape the impression that the nation displays a religious characteristic of sanctity. The Constitutional Court could hardly have proclaimed the clear case for the state nation in more resounding rhetoric.

(b) Ronald Dworkin, apologist of statism

Although probably without actually reflecting on the issue, Ronald Dworkin provides his readers with a typical example of legal thought completely imbedded in the statist paradigm. Dworkin's conceptions, on judicial interpretation, among others, are sometimes described as a unique reflection of the communitarian school of thought.¹⁶⁸ He completed his work against the background of sharp criticism emanating from the ranks of the legal school of *American Realists* and the *Critical Legal Studies* movement on claims that the law is objective. In my opinion, these two trends succeeded in drawing attention to the fact that the law cannot be regarded as an objective neutral normative system, that legal rules are fundamentally indefinite and without a fixed content, and that legal rules will never be able to accomplish legal certainty, due precisely to their indeterminacy. The law is not a fixed system of rules, but simply what the court (and administrators who apply the law) finally proclaims it

¹⁶⁷ Sachs J in *Matatiele Municipality* (n 159 above) para 97 853A. The statement that the nation has a soul had initially been made by Mahomed J, the future chief justice, in the Namibian judgment of *S v Acheson* 1991 2 SA 805 (Nm) and was later echoed by various South African judges. Mahomed J *inter alia* said at 813A-B of his judgment in *S v Acheson*: 'The constitution of a nation is not simply a statute which mechanically defines the structures of "government and the relations between the government and the governed. It is a mirror reflecting the national soul"', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government.'

¹⁶⁸ SA Gardbaum 'Law, Politics and the Claims of Communities' (1990) 90 *Michigan Law Review* 741-742 explains that Dworkin worked with a metaethical form of communitarian thought, as he regarded the community as the source of law.

to be from case to case. It has also been shown that law is fundamentally influenced by extrajudicial factors, including the presiding judge's background and personality, as well as economic and political considerations. In fact, the law is often purely a manifestation of politics. Insights gained by applying hermeneutics, including legal hermeneutics, have yielded similar conclusions, albeit along a different course.¹⁶⁹

Dworkin resisted the notion that legal disputes are resolved on the basis of subjective factors such as the presiding judge's personal biases and predilections, pragmatically in conformity with policy considerations or according to the changing dominant tendencies in politics. He rejected the view that legal disputes are resolved in any other way than in conformity with the legal norms of a specific legal culture.¹⁷⁰ On the contrary, Dworkin was convinced that all legal disputes can be satisfactorily resolved on the basis of rules and principles inherent in the normative framework of the applicable legal system. He believed the legal system to be rich enough in objectively determinable principles that permeate the entire legal system, that all disputes can be resolved by applying these principles and that the need to rely on extrajudicial, pragmatic or utilitarian considerations to be able to exercise a discretion, will therefore never arise.

In the fourth chapter of *Taking Rights Seriously*, Dworkin explains how disputes are resolved in conformity with his coherent *rights thesis* by his fictional super judge, Hercules, through the application of (legal) principles, instead of seeking refuge in pragmatic considerations, like the fictional Herbert.¹⁷¹

When the court has to resolve a dispute, the judge inevitably applies the clearly crystallised rules of the legal system, including common law, statutory provisions and constitutional provisions. In many cases, however, it will occur that there are no clearly defined rules that provide an obvious answer to the legal issue. HLA Hart was aware of this and realised that legal disputes could sometimes not be resolved on the basis of legal rules. He therefore conceded that the judge should apply his judicial discretion in such cases¹⁷² in order to remedy shortcomings in the law.

¹⁶⁹ See for example S Fish *Is there a text in this class? The authority of interpretive communities* (1980) especially 303-353; H-G Gadamer *Truth and method* (1989) (translated from the original German by J Weinsheimer and G Donald) especially 267-377; H-G Gadamer 'Truth in the Human Sciences' (translated from the original German by BR Wachterhauser) in BR Wachterhauser (ed) *Hermeneutics and Truth* (1994) 25-32.

¹⁷⁰ Gardbaum (n 168 above) 743.

¹⁷¹ RM Dworkin *Taking Rights Seriously* (1977) 81-130.

¹⁷² HLA Hart *The Concept of Law* (1961) 129, 141.

However, Dworkin was much more optimistic in his conviction that there is a huge measure of certainty about the legal system's rules and principles. He explained that despite the fact that there is truth in the notion that a lack of detailed legal rules sometimes precludes a judge from instantly resolving a dispute, there are in fact always deep-seated principles that the judge can revert to. When there is a lack of rules, legal principles will determine the rights of the litigants and supply the norms in terms of which the dispute can be resolved. These principles are embedded in the institutional history of the legal system. The institutional history resides in the common law, statutory law and in the constitution of the state in question, including communal morality. Such institutional history is the source of the system of norms. The judge draws from it when he has to perform his duty to resolve a case in a situation where specific rules are unavailable. According to Dworkin's *rights thesis*:

... institutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment, about the right of an individual, must accommodate.¹⁷³

However, it is also true that when Hercules has to infer principles from the institutional history of the legal system, he may find various – even conflicting – principles. Principles may therefore compete with one another to be applied to a specific dispute. Hercules will therefore have to select the correct principle from the conflicting principles. To be able to accomplish this, Hercules will have to examine the *broad political philosophy* behind the institutional history. The correct principle to be selected by him from the competing principles will be the one that accords most faithfully with the broad political philosophy of the institutional history.¹⁷⁴ When Hercules is engaged in his task, he reveals the fundamental principles that underlie a legal system and then applies it to the dispute at hand.¹⁷⁵

What Hercules therefore does, is to discover the principles inherent in the institutional history and then to apply them. Emphasis is placed on *discovering* and *unlocking* existing principles, for Hercules does not discover new inventions, nor does he create new law. He merely discovers that which has long since been in existence, but has, prior to its discovery, not yet been revealed.

For the purposes of this discussion, the crux of Dworkin's *coherent legal theory* lies in the fact that he discovers legal principles within

¹⁷³ Dworkin (n 171 above) 87.

¹⁷⁴ Dworkin (n 171 above) 107.

¹⁷⁵ Dworkin (n 171 above) 116-118.

the matrix of the institutional history of his own legal community that make it possible to resolve any dispute.

According to Dworkin's theory, the source of law is to be found in a single collective moral agent. It needs to be *single*, to prevent his theory from being inherently contradictory and to prevent the failure of his claim that his legal theory is *coherent*. If that were so, the law would degenerate into subjectivism and pragmatism – something Dworkin tried to avoid at all cost. This moral agent, which produces a coherent set of values, is the *entire community*.¹⁷⁶ Dworkin's community, the collective author of the law, is a community united by principles – 'a community of principle'.¹⁷⁷ Such a community of principle, which makes governing in terms of principles possible, is the nearest one could come to a true community.

Dworkin's belief in the potential of legal principles attracted fierce criticism.¹⁷⁸ Due to Dworkin's unwavering belief in the possibility of always finding legal certainty in principles, HLA Hart aptly described him as *the most noble dreamer of them all*.¹⁷⁹ What Dworkin must, however, be particularly criticised for is his offhand identification of the concepts of community and state. Dworkin's institutional history is no more than the institutional history of the legal system of the territorial state. Without the slightest hint of hesitation he assumed that the legal system of the state is coherent. He accepted that the state by definition accommodates a coherent legal community, where a general moral and legal consensus reigns. Dworkin regarded the state, more precisely the statist community, as the source of coherent law and especially of coherent legal principles. In this respect one may regard Dworkin's views as a trend within the communitarian mode of thinking. It is unique, because he accepts without question that the state is indeed a community. However, for Dworkin it is the state which is of primary importance, and not the community. It is therefore more apt to describe him as a defender of the statist order, instead of imputing communitarian sentiments and convictions to him. This inevitably places Dworkin in the ranks of the state-builders. Without further ado he equates community and state.¹⁸⁰ He presents his readers with a coherent set of legal principles, originating from the statist order. In the process he omits mentioning the lack of coherence, the variation of values, the internal conflict of opposing communities, and the dominance of one set of values, convictions and interests with a concomitant

¹⁷⁶ Gardbaum (n 168 above) 743; RM Dworkin *Law's Empire* (1985) 188.

¹⁷⁷ Gardbaum (n 168 above) 743; Dworkin (n 171 above) 190-215.

¹⁷⁸ See AE van Blerk *Jurisprudence: An Introduction* (1996) 97-102.

¹⁷⁹ HLA Hart 'American Jurisprudence through English Eyes: The nightmare and the Noble Dream', contained in *Essays in Jurisprudence and Philosophy* (1983) 137.

¹⁸⁰ Dworkin (n 171 above) 167.

suppression of all other sets of non-dominant values, convictions and interests that often operate within the state. He accepts out of hand that the statist order is coherent and legitimate. The truth is rather to be found in the converse of Dworkin's assumption. The existing statist order emanating from previous unequal power relationships is often an embodiment of the domination of a hegemonic formation over powerless and weaker groupings. Dworkin fails to mention this, however, because he regarded the system as coherent and legitimate. Everything is all right. And the more everything is all right, the stronger the argument for maintaining the existing order.

Ian Duncanson¹⁸¹ turned his sights on Dworkin by pointing out that the type of (statist) nation community that forms the collective source of Dworkin's legal principles, is simply nonexistent. In so far as the nation community in fact finds application as a theoretical concept, it functions as an instrument aimed at legally entrenching the domination of the hegemonic component of the state over the rest – and the rest, one may add, are usually politically powerless minorities. The legal institutions of such supposed nation communities are foreign to – and often hostile towards – large parts of the nondominant components of the state population. Duncanson declared that Dworkin's *Law's Empire* is in fact not coherent. On the contrary, it rather reminds of incoherence, heterogeneity and dominance – to Duncanson's mind of something such as the extremely heterogeneously concocted Austrian-Hungarian Empire.¹⁸²

Dennis Davis aired his concerns about the implications of Dworkin's theory for South Africa in particular. He regards Dworkin's conceptions of legal coherence as inherently undemocratic. He therefore criticises Dworkin for his view of the law as a coherent system, settled in the so-called *community*, which has to be articulated by the courts. According to Davis, legal coherence is irreconcilable with free democratic political activity, which is precisely based on competition and the maintenance of diversity.¹⁸³

Just like the statist *boni mores*, *national aspirations* and the *national ethos*, Dworkin's legal principles are also an unmistakable product of a statist mode of thinking. The author of legal principles is the general statist community. The statist order is without ado

¹⁸¹ I Duncanson 'Law, democracy and the individual' (1988) 8 *Legal Studies* 304 *et seq.*

¹⁸² Duncanson (n 181 above) 310.

¹⁸³ DM Davis 'Integrity and Ideology: towards a critical theory of the judicial function' (1995) 112 SALJ 129-130. In the judgment of *Ryland v Edros* 1997(1) BCLR 77 (C) the Court successfully identified and debunked dominant conceptions within a community with democratic aspirations. See K Malan 'Oorgelykheid en minderheidsbeskerming na aanleiding van *Ryland v Edros* en *Fraser v Children's Court Pretoria North*' (1998) 61 *Journal of Contemporary Roman-Dutch Law* 300 *et seq* for a discussion of this judgment.

accepted as a fixed and permanent premise. The question of whether the reigning statist order is desirable, never arises for consideration, neither is its possible amendment ever mooted. The statist order is therefore regarded as a permanent reified premise, instead of a temporary historical and therefore variable phenomenon.

The views of both Rawls and Dworkin, as well as the general statist *boni mores* and *national ethos* appear together on the statist agenda and jointly contribute to the entrenchment of the reigning statist order, in the face of the challenges of change. These three schools of thought all function as strategies to reinforce and stabilise the reigning territorial state and statist identity. They are state-building strategies functioning in legal theory and daily legal practice.

1 Statist democracy – democracy tamed by the statist paradigm

Nowadays democracy has no rhetorical equal. The concept has an almost matchless persuasive force. The magnetism of democracy is stronger than any other conception in the public lexicon and it is a rather futile exercise to endeavour to find opponents and challengers of democracy.

The rhetorical power of the concept of democracy has also been with us for longer than one would realise. As far back as 1849, Francois Guizot remarked that the concept of democracy is so overpowering that a government or party could never survive without pledging its allegiance to it.¹ In view of the later challenges that democracy would have to overcome in the twentieth century, this statement was controversial at the time it was uttered. However, after the Second World War in which the challenges of National Socialism and Fascism were defeated, democracy has finally been so firmly entrenched that UNESCO could come to the conclusion that there is no trace any more of any measure of official repugnance against democracy to be found anywhere.²

Presently democracy enjoys universal approval and support³ and almost everybody claims to be a democrat.⁴ As a matter of fact, democracy has an almost magical aura.⁵ It is universally acknowledged and lauded.⁶ Due specifically to its sanctity and

¹ Quoted by A De Benoist 'Democracy Revisited' (1993) *Telos* 65.

² HB Mayo *An Introduction to Democratic Theory* (1960) 21.

³ B Holden *The Nature of Democracy* (1974) 3; AM Faure & DJ Kriek (eds) *Die modern politieke teorie* (1984) 33.

⁴ CD Lummis *Radical Democracy* (1984) 14.

⁵ WP Esterhuyse 'Wat is demokrasie?' in *Filosoof op die Markplein: Opstelle vir en deur Willie Esterhuyse* (1996) 47.

⁶ G Sartori *Democratic Theory* (1962) 8; De Benoist (n 1 above) 65; Faure & Kriek (n 3 above) 34.

laudability, democracy functions as a political legitimator.⁷ As soon as a political dispensation has acquired *democracy's* stamp of approval, it is legitimate without further ado and therefore firmly entrenched against any attacks and also snugly indemnified against any challenges, for who will, after all, be so brave, arrogant or foolish to challenge a *democratic* state? Democracy is after all inherently and unquestionably legitimate. It is a concept that carries, as it were, its legitimacy in itself.⁸

The democracy concept has triumphed to such an extent that it has also established a foothold in legal theory and practice. Great progress has been made towards gaining international recognition of the individual right to basic *democratic* procedures (general suffrage, the recognition of political parties, free and fair elections, etc) as a minimum requirement for legitimate government.⁹ Furthermore, the concept of democracy also appears in many national constitutions, as well as in international and regional human rights instruments. In such instruments it functions as a mechanism to protect rights, since it is normally required that, in order to be valid, any limitation of rights must conform to the values of a democratic society.¹⁰ In this way the concept of democracy is utilised as a legal doctrine obtaining as a criterion and arbitrator in disputes concerning a wide array of conflicting legal claims.¹¹

On a much greater scale Francis Fukuyama argued that the final destination of humankind's ideological history was reached when Western liberal democracy was universalised as the final form of human government. The principles of liberal democracy could not be

⁷ Esterhuysen (n 5 above) 47; Faure & Kriek (n 3 above) 34.

⁸ Esterhuysen (n 5 above) 47.

⁹ TM Franck 'The emerging right to democratic governance' (1992) 86 *American Journal of International Law* 49-50, 90 n 9. For the growing recognition of the right to democratic procedures and government, see article 3 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms in which the parties to the convention bind themselves to observe regular free and fair elections by way of secret ballot.

¹⁰ See in this respect section 36(1) of the Constitution of the Republic of South Africa, 1996, and also its predecessor, section 33(1) of the Interim Constitution, Act 200 of 1993. Of a similar nature is the — often quoted in South Africa — limitation clause, article 1 of the Canadian Charter of Rights and Freedoms, an integral part of the Canadian Constitution, Act 79 of 1982, which provides that rights can only be limited in so far as such limitation is reasonable and manifestly justifiable in a free and democratic society. On the international front, the concept of democratic society appears as a limitation requirement in article 29(2) of the Universal Declaration of Human Rights of the UN, article 4 of the International Covenant on Economic, Social and Cultural Rights and articles 14 and 21 of the International Covenant on Civil and Political Rights. At the regional level, the concept appears *inter alia* in articles 6, 8(2), 9(2) and 10(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms and in article 2(3) and (4) of the Fourth Protocol to the Convention.

¹¹ O Jacot-Guillarmod 'The relationship between democracy and human rights' in *Democracy and Human Rights: Proceedings of the Colloquy* organized by the Government of Greece and the Council of Europe (1987) 55.

improved upon. To his mind all the great ideological controversies have become irrelevant, no important questions remain and the only extant issues of concern are economic activity and administration. Liberal democracy is the only norm and anything that deviates from it should be identified for the purposes of phasing out.¹²

For the exact reason that it enjoys such universal recognition, democracy can take on such a wide variety of meanings that it finally becomes meaningless, or changes into a myth quite alien to the reality of political practice. In this respect Giovanni Sartori at the beginning of his major work on democratic theory, states:

In a somewhat paradoxical vein, democracy could be defined as a high flown name for something which does not exist.¹³

Nevertheless, democracy has in fact already acquired a meaning in respect of which there is a great measure of consensus in the present legal and political discourse (in the academic sphere and as a theme of daily practice). A procedural-structural definition of democracy has emerged. Accordingly, great care has been exercised to attribute a meaning to democracy that would enable it to uphold the modern territorial state and to protect it against change. This form of democracy functions according to the needs of the statist order.

John Dunn explained that since the mid-seventeenth century the practical character of the state has increasingly set the terms for the institutional candidates for legitimate political authority.¹⁴ In other words, political and legal notions must be conceptualised in such a way as to entrench the existing statist order and contribute to its maintenance. Should this not occur and should the way in which any particular notion is conceptualised contribute towards the destabilisation of the state in its present form, it will be regarded as irrelevant and dysfunctional and excluded from the discourse. Thus, the need to maintain the existing statist order – a political consideration – determines what is scientifically relevant, and what not.

On close analysis the territorial state itself appoints the institutions that will ensure its stability and best serve its interests. According to Carl Friedrich,¹⁵ the state is the active agent that

¹² F Fukuyama 'The End of History' 1989 19 *The National Interest*. Fukuyama explains his Hegelian-based argument in F Fukuyama *The end of History and the Last Man* (1992).

¹³ G Sartori 1962 1. Sartori also quotes Bertrand de Jouvenel (9) who avers that discussions on democracy are meaningless, because we are ignorant of the true meaning of the word.

¹⁴ J Dunn (ed) *Democracy: The Unfinished Journey - 508 BC-AD 1993* (1993) 248.

¹⁵ On this, see chapter 6.1.

determines the character of the nation in conformity with the interests of the state. The territorial state, however, does not only shape the character of its nation – the disciples of the mortal god. It also determines the nature of its distinctive legitimate government institutions and procedures, all of which have to fulfil their own state serving and state stabilising functions. In the same way that the state gathers a nation – a state nation – for itself after its own image, it similarly determines its government institutions after its own image and in conformity with its needs and interests. In this way the territorial state has also determined the present sanctified institution of democracy as the only legitimate form of government, not only excluding nondemocratic challengers, but also all forms of democracy other than statist democracy.

The pertinent point is that modern democracy and democratic theory (in politics, political theory and constitutional law) are the thoroughbred offspring of the statist paradigm and that many commentators on this type of democracy are faithful (and mostly unwitting) servants of the statist paradigm. This simultaneously establishes them as protectors of the reigning order of the territorial state.

Statist democracy with its characteristic structural and procedural traits (discussed later) is democracy made safe for the territorial state, i.e. democracy that is designed so as to serve the interests of the territorial state. In this regard John Dunn maintains:

Representative democracy is democracy made safe for the modern state; democracy converted from unruly and incoherent master to docile and dependable servant.¹⁶

Contemporary democracy is tamed – domesticated – democracy that sallies forth on the leash of the statist paradigm.

What then are the characteristics of modern statist democracy? To be able to answer this question, we first have to state that democracy is, of course, not an entirely modern phenomenon. In its classical form it lasted for two hundred years, as a vigorous institution in Athens from 508 BC until the founding of the Macedonian Empire.¹⁷ It also manifested itself until the twelfth century, in the common European practice of the election, instead of the hereditary succession of kings.¹⁸ Furthermore – and this is extremely important – customary law that had, of course, not been decreed by the king, but had emanated from the people, was regarded in medieval Europe

¹⁶ Dunn (n 14 above) 248 and 250.

¹⁷ M. I. Finley *Democracy Ancient and Modern* (1985) 66.

¹⁸ De Benoist (n 1 above) 66.

and long afterwards as an expression of popular participation in government.¹⁹ Customary law changed in conformity with the changes that occurred in popular usage. Without interference of any institution like a legislature officially ordaining the law, the law therefore changed directly and immediately, in conformity with popular custom. It is therefore the purest and most unbridled form of popular sovereignty imaginable. Furthermore, one also finds Icelandic democracy – the Nordic Hellas – that appeared around 930 AD. Here, direct democracy was practised by means of the popular assembly, called the *thingvellir*.²⁰ Traces of democracy were also noticeable in the late medieval cities.²¹

Protomodern democracy appeared on the scene for the first time by the mid-seventeenth century with the *Levellers* in England. They were the first democrats to deviate from the pattern of participatory, direct democracy in a city state and they were the first exponents of democracy as representative government in a territorial state.²² Therefore, the advent of modern democracy coincided with that of the territorial state as the reigning political configuration. However, absolutism stifled democracy for 150 years. Late in the eighteenth century it returned with a vengeance.²³ This time it was driven by the revolutionary figures of the French Revolution²⁴ and by democratic practices in the United States of America.²⁵ Its return was a full-scale return in the form of *representative* democracy. Nowadays the idea of representation is so intimately identified with democracy that the new democracy has by definition become representative democracy.²⁶ The two most important pioneers involved in the establishment of the notion of representative democracy, are Immanuel Joseph Sieyès²⁷ and Thomas Paine.

Paine was excited about the ‘representative system.’ Due to its direct nature, the Athenian democratic model could only operate within a restricted geographic and demographic dispensation. Direct democracy, however, was unable to handle the enlargement of the political order and therefore deteriorated into a monarchy or an aristocracy. Paine was of the opinion, however, that a representative

¹⁹ De Benoist (n 1 above) 67; see also chapter 2.2.

²⁰ De Benoist (n 1 above) 67.

²¹ GE Frug ‘The city as a legal concept’ (1980) 93 *Harvard Law Review* 1069, 1083 *et seq.*

²² D Wootton ‘The Levellers’ in J Dunn (n 14 above) 71. At the same time *Democraticall* government also appeared in the Rhode Island Constitution. On this, see RL Hanson ‘Democracy’ in T Ball *et al* (eds) *Political Innovation and Conceptual Change* (1989) 72.

²³ De Benoist (n 1 above) 69; Finley (n 17 above) 9-10; Hanson (n 22 above) 72.

²⁴ Finley (n 17 above) 9-10.

²⁵ Hanson (n 22 above) 72.

²⁶ B Fontana ‘Democracy and the French Revolution’ in J Dunn (n 14 above) 117.

²⁷ B Fontana (n 26 (n 14 above) 117.

system provided a totally effective cure for such degeneration, and expressed this as follows:

Retaining, then, democracy as the ground, and rejecting the corrupt systems of Monarchy and aristocracy, the representative system naturally presents itself; remedying at once the defects of simple democracy as to form, and the incapacity of the other two with respect to knowledge.²⁸

Paine sharply attacked aristocratic government and monarchy in particular, describing it as a tyrannical, irrational and ridiculous system, often fomenting gruesome conflict among states in which the ordinary citizens of the states waging war have to bear the brunt, in order to fulfil the needs of their monarchs.²⁹ In contrast to the monarchical system – Paine calls it the hereditary system – with all its vices, one finds the virtuous representative system, based on wisdom and rationality due to consultation with, in the form of representation of, everyone.³⁰ From Paine's discussion it follows incontestably that democracy had until the turn of the eighteenth century mainly been associated with direct democracy.³¹ Paine is extremely loath to equate representative democracy with democracy. He keeps on using the concept of *representative system*, instead of representative democracy.³² The representative characteristic of democracy was the first fundamental modification effected to classic democracy to enable it to fall in line with the needs of the territorial state, i.e. the first step in the process of domesticating democracy on the yard of the territorial state.

When John Stuart Mill's *Considerations on Representative Government* was published in 1861, democracy defined as a representative system was theoretically comprehensively conceptualised for the first time. Mill assumed and aimed to show that democracy – representative democracy in particular – is an excellent system and that it was indeed attainable within the territorial state. One may regard Mill as the protoscholar of democracy in terms of the needs of the territorial state.³³ Representative government – to Mill the ideal form of government³⁴ – is not a form of government where the people govern in person, but

²⁸ T Paine *The Rights of Man* (Introduction by Derek Matravers) (1996) 136.

²⁹ Paine (n 28 above) 126-132.

³⁰ Paine (n 28 above) 132 *et seq.*

³¹ Holden (n 3 above) 5.

³² Paine (n 28 above) 128.

³³ G Duncan & S Lukes 'The New Democracy' (1963) 11 *Political Studies* 158.

³⁴ JS Mill *Considerations on Representative Government* (ed HB Acton) (1972) 202. It is conspicuous that Mill used the word democracy sparingly and rather continued to employ the phrase representative government.

where they exercise final control through the agency of their periodically elected representatives.³⁵

Therefore, Mill regards democracy as something different from that which is denoted by the etymological origin of the concept of democracy. To Mill, democracy is not really *demos-kratos* -government by the people³⁶ – but rather control exercised by the representatives of the people over the actual rulers who constitute the executive authority.

The representative body itself is totally incompetent to govern. The task of the representative body is therefore not to govern by itself, but to keep an eye on the government and control it, to keep government conduct in the spotlight, to force government to explain and justify its actions, to censure government whenever necessary and, whenever government breaches its trust towards the people, to remove it and replace it with another government.³⁷ In addition to the crucially important control function of the representative assembly, it also serves as the forum where the citizenry can speak its mind. Mill has this to say on the topic:

... Parliament has an office ... to be at once the nation's Committee of Grievances, and its Congress of opinions.³⁸

In Parliament all views should be heard, including those of each segment of the population and of every prominent individual.

At the same time the forum for expressing points of view ensures a continuous survey of public opinion, for in the representative body views are exchanged and waning and waxing opinions within the ranks of the people are registered. To Mill, the talk function, i.e. the function of expressing views, is a very important one. There is nothing more meaningful than having a debate on public issues of great importance and debating all interests and everybody's point of view.³⁹

The representative body is therefore not the actual government and legislature, but a forum of control and opinion that should be constituted in such a way that it can reliably represent every imaginable trend and view in the country and also act as their voice.⁴⁰ In Mill's representative government, the franchise and elections naturally fulfil a key role. In fact, without these one cannot imagine

³⁵ Mill (n 34 above) 228.

³⁶ On etymological democracy, see Sartori (n 6 above) 17-30.

³⁷ Mill (n 34 above) 239.

³⁸ Mill (n 34 above) 239.

³⁹ Mill (n 34 above) 240.

⁴⁰ Mill (n 34 above) 240-241.

any representative democracy at all. For this very reason, exercise of the franchise has become the crux and hallmark of modern democratic practice. Mill required literacy as a precondition for suffrage and therefore argued that universal education should always precede universal suffrage.⁴¹ Differing from the present position and in conformity with his times, Mill had not yet come to terms with equality as one of the fundamental characteristics of democracy.⁴² He therefore argued that only taxpayers are entitled to decide on measures concerning taxes. Furthermore, Mill was of the opinion that although property is an inappropriate criterion for conferring suffrage, more votes should be bestowed upon professional persons, graduates, bankers, businessmen and the like.⁴³

Suffrage serves the broad aim of representative government. The point is that suffrage is not posed as a requirement for enabling persons to govern as such, but for exercising control over the rulers and thereby ensuring that the people are not misgoverned.⁴⁴ The converse of the control function exercised by the elected representatives of the people, is that government must be receptive and sensitive to the needs expressed in the representative assembly and should be conscientious in its reaction. The hallmark of representative government should therefore be that government accommodates the citizenry on a continuous basis and must govern in terms of the interests and needs of its citizens.⁴⁵

The modern authoritative formulation of what democracy is and what it should be, on the one hand builds upon the foundations laid by Mill. On the other hand, it is completed and refined by certain contemporary structures and processes regarded as indispensable for democracy. This gives rise to what can aptly be described as democratic orthodoxy. The potentially disruptive implications of democracy, should another meaning be imputed to it, are prevented in this manner. Thereby democracy – to employ the words of John Dunn again – is domesticated for the sake of the undisturbed maintenance of the modern territorial state. In this way democracy has been tamed to trustingly wander on the leash of the territorial state. Henry Mayo provides us with a useful explanation of the content and meaning of democracy within the guidelines and disciplines of the statist paradigm and in accordance with modern general practice.⁴⁶

⁴¹ Mill (n 34 above) 280.

⁴² According to Sartori (n 6 above) 51 all discussions on democracy centre around the related and mutually dependent concepts of popular sovereignty, equality and self-government.

⁴³ Mill (n 34 above) 281-285.

⁴⁴ Mill (n 34 above) 291: 'Men, as well as women, do not need political rights in order that they may govern, but in order that they may not be misgoverned.'

⁴⁵ RA Dahl *Polyarchy: Participation and Opposition* (1971) 1-2.

⁴⁶ Mayo (n 2 above).

According to Mayo – in tandem with Mill – the essence of democracy is to be found in the public control of rulers and decision-makers. This means that a system will be democratic if it is subjected to effective public control.⁴⁷ Democracy is therefore not a political system in which people govern themselves, but the degree of democracy is gauged in terms of the extent to which people, as voters, have the capacity to control and remove their rulers.⁴⁸

Political equality is the second *essential* requirement of democracy. This element is reflected in the principle of equal suffrage for all adult citizens.⁴⁹ It implies that every person will have only one vote, that nobody has the right to vote more than once and that each vote carries the same weight.⁵⁰ The principle of general suffrage has become axiomatic in contemporary democratic practice and is regarded as a universal fundamental human right.⁵¹ Probably of even greater importance is the fact that suffrage is regarded as an essential characteristic of individual dignity.⁵² Nonrecognition of suffrage thus not only constitutes a disregard of a political right, but also an insult to the individual personality. The South African Constitutional Court goes very far in describing the vote in the following terms: 'The vote of each and every citizen is a badge of dignity and of personhood.'⁵³

Without general suffrage, popular control would naturally be impossible and nowadays democracy and general suffrage are regarded as two sides of the same coin.⁵⁴ Suffrage consequently constitutes a test of the authenticity of a system that claims to be a democracy: the more general the suffrage, the more democratic the system and the more qualified the suffrage, all the less democratic it is.⁵⁵

⁴⁷ Mayo (n 2 above) 62.

⁴⁸ Mayo (n 2 above) 72-73; Sartori (n 6 above) 66.

⁴⁹ Mayo (n 2 above) 62-64, 107-136. See further Holden (n 3 above) 9, 18.

⁵⁰ Mayo (n 2 above) 64.

⁵¹ Mayo (n 2 above) 116. It exists in all national bills of rights and appears in article 21(1) and (3) of the Universal Declaration of Human Rights of the UN, as well as article 25(b) of the International Covenant on Civil and Political Rights.

⁵² Mayo (n 2 above) 116.

⁵³ Thus, according to Sachs J in *August and Another v Electoral Commission and Others* 1999 4 BCLR 363 (CC) para 17 (372E). See further the similar statements in *Democratic Alliance v Masondo* 2003 2 BCLR 128 (CC) 140l (para 43). For further arguments in support of universal suffrage, see Mayo (n 2 above) 118-121; Duncan & Lukes (n 33 above) 159.

⁵⁴ Mayo (n 2 above) 120; SP Huntington *The Third Wave: Democratization in the late twentieth century* (1993) 7; Sartori (n 6 above) 73; Holden (n 3 above) 32; G Tenekides 'The relationship between democracy and human rights' in *Democracy and Human Rights: Proceedings of the Colloquy* organized by the Government of Greece and the Council of Europe (1987) 19; Judgment of the South African Constitutional Court (per Yacoob J) in *New National Party of South Africa v Government of the RSA and Others* 1999 5 BCLR 489 (CC) para 11 (494 G-l).

⁵⁵ Huntington (n 54 above) 7.

The third *essential* requirement of modern democracy is that democracy by definition implies a multiparty dispensation. According to this political participation occurs by means of party formation and by parties' participation in free, fair and regular elections⁵⁶ in which citizens can cast their votes without any coercion and fear of intimidation.⁵⁷ It is based on the premise that free political choices are only possible if various political parties are able to participate in elections. It is the very existence of a variety of political parties that creates the possibility of exercising a free political choice. When a number of political parties participate in an election, (passive) suffrage acquires an active meaning. Party formation and participation in politics by parties have become so important that since the late nineteenth century, democracy has in fact implied government by a party.⁵⁸

The fourth (and final) *essential* element of statist democracy is majority government,⁵⁹ that is to say that the majority has the right to lay claim to exercising all the functions of government.⁶⁰ This principle is supported by the argument that the majority is probably right.⁶¹ The majority principle also logically connects with one of the other essential requirements of contemporary democracy, namely the equality principle. If the minority were to govern, it would mean that the votes of those individuals that constitute the minority in fact carry more weight than the votes of those constituting the majority.⁶² Nowadays, this argument in particular is regarded as the most persuasive in favour of majority government.⁶³ Sartori explains that value judgments do not underlie the majority principle, but that this principle is, on the contrary, a mere procedural arrangement.⁶⁴ Public disputes must be finalised at some stage and the majority principle would constitute a useful method for finally resolving such disputes. It can, as it were, be regarded as the application of the *res iudicata* principle in macro-constitutional law.

A number of constitutional mechanisms are added to these four essential elements of statist government. These mechanisms are also regarded as important characteristics of statist democracy. The recognition of basic human rights, constitutionalism, the rule of law, *trias politica* and an independent judiciary are all regarded as basic

⁵⁶ Huntington (n 54 above) 9; Esterhuyse (n 5 above) 50.

⁵⁷ Mayo (n 2 above) 64-66.

⁵⁸ CS Maier 'Democracy since the French Revolution' in J Dunn (n 14 above) 136.

⁵⁹ Mayo (n 2 above) 174-181.

⁶⁰ Esterhuyse (n 5 above) 54.

⁶¹ Mayo (n 2 above) 174.

⁶² Mayo (n 2 above) 178; Holden (n 3 above) 104-106.

⁶³ Mayo (n 2 above) 182 and similar additional arguments at 179-181.

⁶⁴ Sartori (n 6 above) 103.

characteristics of modern democracy.⁶⁵ A prominent spokesman in the South African context, Arthur Chaskalson, the first president of the Constitutional Court, places the courts at the centre stage of what he regards as genuine democracy.⁶⁶ The democratic structures referred to earlier all seek to be power-controlling mechanisms on government and to contribute as such to the protection of individual interests.⁶⁷ For this very reason modern democracy is liberal democracy. The power of popular sovereignty and the danger that it could lead to the infringement of basic individual rights, must be countered by protecting fundamental individual rights.⁶⁸ Liberal democracy does not in the first place intend to accomplish collective participation in the exercise of public authority. It is not primarily aimed at participating in affairs of state, but at freedom from – insulation against – the state. It endeavours to keep the state at a distance.⁶⁹ The recognition of individual rights is of cardinal importance in terms of this school of thought, because – as Sartori warns us – nonliberal democracy is totalitarian democracy⁷⁰ that encroaches so deeply upon civic and private lives that its prescriptions will in the long run completely eliminate basic freedoms.

The explanation of the essential characteristics of statist democracy (which also correlates with how people normally experience democracy)⁷¹ entails that democracy is presently defined in a structural-procedural way.⁷² The logic of such structural-procedural definition is as follows: to ascertain whether a democratic order is in place, one does not ask where authority vests within the political order (state). On the contrary, it is accepted without

⁶⁵ On this, see for example: GA Rauche 'Die konsep demokrasie' in AM Faure *et al Suid-Afrika en die Demokrasie* (1988) 5; M Wiechers 'Herdemokratisering' in AM Faure *et al Suid-Afrika en die Demokrasie* (1988) 205-206.

⁶⁶ A Chaskalson (1992) 'Democracy and Law' (1992) 2 *Idasa Occasional Papers* 6. In the South African Constitution, 1996 human rights are characterised as the essence of democracy. Section 7 declares human rights a cornerstone of democracy in South Africa.

⁶⁷ RA Dahl *A preface to democratic theory* 1984 4 *et seq* describes such formal controls on power as (classical) Madisonian Democracy.

⁶⁸ C Mouffe 'Democratic Politics Today' in C Mouffe (ed) *Dimensions of Radical Democracy* (1992) 11.

⁶⁹ WLJ van Vuuren 'Sartori' in AM Faure & DJ Kriek *Die Moderne Politieke Teorie* (1984) 66.

⁷⁰ Sartori (n 6 above) 377. Sartori points out (141) that without the simultaneous recognition of the private domain, democracy holds totalitarian implications: '... the hypothesis that a democratic state can become totalitarian, meaning that it can become an all-pervading total State, is perfectly plausible. For, in principle, no political formula can justify a totalitarian expansion of political power as easily as democracy.'

⁷¹ Huntington (n 54 above) 8.

⁷² Mayo (n 2 above) 33; Sartori (n 6 above) 238-241; Faure & Kriek (n 3 above) 68; Esterhuysen (n 5 above) 49-50; G O'Donnel & PC Schmitter *Transitions from authoritarian rule* (1989) 8; Huntington (n 54 above 7-9; Holden (n 3 above) 27-28; Mouffe (n 68 above) 12; J Kotze & JJ van Wyk *Basiese konsepte in die politiek* (1990) 34. (There is a plethora of other examples of this structural-procedural definition.)

question that as soon as the structures and procedures that we have just discussed (general suffrage, regular elections, political parties, majority government, *trias politica*, an independent judiciary and the protection of basic rights) are present, genuine democracy has indeed been established.⁷³ These procedures are the decisive criteria for democracy and when they are complied with, the system concerned acquires the hallmark of true democracy. It is extremely important to note that since these structures and procedures are put forward as the essential elements of democracy, any further normative questions concerning the essence of democracy have become superfluous and irrelevant. Any possible normative questions concerning democracy are therefore ruled out of order, because the reigning democratic practice, in terms of the said procedures and structures are offhand presented as democratic.⁷⁴ Consequently the democracy discourse can easily be forced into a positivistic straitjacket.

The ordinary citizen accordingly experiences democracy as merely a few procedural rights which are occasionally exercised during election time, and not as a real exercise of power in unison with fellow citizens. Within the conceptual and practical confines of contemporary democracy, the individual citizen acts primarily in the capacity of a mere *voter*.⁷⁵ This capacity is actually an integral element of modern democratic theory. That is because politics affect everybody's interests and therefore no one can be excluded from the procedural rights to which every voter is entitled. It is not someone's specific abilities that qualify him or her to from participate in politics and to exercise the procedural rights of a voter. Had that been the case, many persons could not qualify as voters because of their deficient capabilities. The truth is that people are allowed to participate in the political process only on the assumption that they all enjoy equal worth as human beings, while their varying political knowledge, insight and skills are not taken into consideration. All people are endowed with the same individual dignity and therefore they all qualify as voters for purposes of exercising the procedural rights attached to them in their capacity as voters. In this respect the nature of the qualities to take part in the democratic process can be clearly distinguished from the exact criteria pertaining to skill and ability required to qualify for participation in professional activity. With the democratic process, however, ignorance presents no

⁷³ Esterhuyse (n 5 above) 49-50; Faure & Kriek (n 3 above) 68.

⁷⁴ Sartori (n 6 above) 241 blames the French and the Americans in particular and states:

The Anglo-American doctrine does not have to deal with questions of principle, with fundamentals, or as we may say in my country, with the conceptual issue. It suffices for it to define democracy with respect to its technical articulations and procedure.

⁷⁵ Sartori (n 6 above) 76-80; Finley (n 17 above) 36.

difficulty at all — quite the contrary. Sartori's explanation elucidates this aspect as follows:

An astronomer who discusses philosophy, a chemist who speaks about music or a poet who talks about mathematics will not utter less nonsense than the average citizen interviewed by a pollster. The difference is that the astronomer, the chemist and the poet will generally avoid making fools of themselves by pleading ignorance, whereas the citizen is forced to concern himself with politics and in the midst of general incompetence that he no longer realizes that he is an ass. So the only difference is that in other zones of ignorance we are warned to mind our own business, while in the political realm we are encouraged to take the opposite attitude and thus we end up not knowing that we know nothing.⁷⁶

We can proceed further along the road of democratic ignorance by singing its praises as an authentic democratic attribute, instead of lamenting it. Walter Lippmann actually remarked that the goal of modern government is not to burden the citizen with issues that are probably beyond his comprehension, but in fact to accomplish the opposite by shifting such burden to the responsible administrators.⁷⁷ A truly virtuous citizen will rather decline the responsibility to make decisions on such matters and reserve his opinion until the effects of the administration's decisions manifest themselves. The focus of democracy shifts far away from active participation, to exerting control as the distinguishing characteristic of democratic practice. If the government can be successful in fulfilling the needs of its citizens, the system will be authenticated, without further ado, as democratic.⁷⁸ In this way democracy is depoliticised, takes on an economic appearance and becomes part of the economic consumer culture. The result of all of this is that the (political) voter, who has already been severely reduced in a political sense, undergoes a metamorphosis, becoming an (economic) consumer. The political order presenting itself here, reminds one of eighteenth century enlightened despotism⁷⁹ and may aptly be described as enlightened bureaucracy.

The main reason why it is possible for democracy to accommodate the ignorance, nonchalance and incompetence of the voter/citizen so easily, is the fact that politics — namely democratic politics — in terms of the pattern it has adopted in the territorial state, is not

⁷⁶ Sartori (n 6 above) 76.

⁷⁷ Hanson (n 22 above) 82.

⁷⁸ Hanson (n 22 above) 84.

⁷⁹ Likewise, enlightened despotism was not bent on achieving participation, but rather to accomplish the realisation of needs. It aimed to serve the state interest in the best way by means of rational government, but also simultaneously to accommodate the needs of the citizens. See in general R Wines (ed) *Enlightened Despotism: Reform or Reaction?* (1967).

really regarded as a full-fledged public affair any more. If politics were to be regarded as not only a matter that concerns private interests, but also public interests (separable and distinguishable from private interests), the individual who remains apathetic towards the public interest would not have been entitled to have any say in public affairs. Such person would simply not qualify as a participant in politics. On the other hand, if politics were to be fundamentally associated with individual dignity and with private affairs and interests, everyone will of course qualify as voters, irrespective of the degree of their interest, expertise, stupidity, nonchalance, competence, ability, etc.⁸⁰ This monopolising of politics as the battlefield for settling private interests was expedited by what Hannah Arendt describes as the *rise of the social*.⁸¹ It implies, among other things, a phenomenal rise in the socio-economic needs of all individuals. As a result, politics, once the domain of public and common affairs, is utilised to satisfy individual needs and therefore to enrich the private individual way of life. Social needs consequently monopolise the public domain and the public domain becomes the space where private individual needs are satisfied.⁸²

It occurs, especially in the legal sphere, with its inherent inclination to serve the agendas of others,⁸³ as pointed out in chapter 5, that the structural-procedural approach to democracy will be regularly echoed without a trace of criticism.

As has already been pointed out above the concept of democracy rears its head in many national constitutions, as well as in international and regional human rights instruments.⁸⁴ In these instruments it functions as a requirement to be complied with to effect the valid limitation of constitutional rights. Case law in which the content of the concept was alluded to, reflects no critical inclination towards the issue of what the content of *democracy* or *democratic* society entails. On the contrary, the courts have gradually been giving less attention to the importance of the theoretical concept or general standard of *democratic society* and have accepted without further ado that the procedural-structural system discussed above, does indeed reflect the essence of democracy. In effect, the

⁸⁰ Gordon Wood explains how the transfer of politics from the public to the private domain was accounted for and recognised in the Pennsylvania Assembly in 1786. The tradition of politics as a public matter was overthrown and it was eventually accepted as normal and correct to accept that politics could serve as the battlefield of competing efforts to realise private needs. See GS Wood 'Democracy and the American Revolution' in J Dunn (n 14 above) 102-103.

⁸¹ H Arendt *The Human Condition* (1958) 38 et seq.

⁸² Arendt (n 81 above) 69.

⁸³ N McCormick 'Reconstruction after deconstruction: A Response to CLS' (1990) 10 *Oxford Journal of Legal Studies* 537. This aspect was discussed in great detail in chapter 5.2

⁸⁴ n 10 above.

original aim of provisions of this nature, namely to restrict the limitation of fundamental rights by subjecting it to the standards of a democratic society, has mainly lost its importance.⁸⁵ The concept of democracy is not interpreted by the courts and the presence of stereotypical procedures and structures, discussed earlier, is regarded as sufficient reason to accept that a democratic society does indeed exist.⁸⁶ South African courts have sporadically paid some attention to the concept of democracy. In *Democratic Alliance v Masondo* Judge Sachs, for example, remarked that the South African constitution envisages a pluralistic society and that democracy should not be restricted to a mere vote-counting exercise in the idiom of 'winner takes all'.⁸⁷ He added that participating democracy is directed towards the accomplishment of better decisions⁸⁸ and that the notion of judicial control in itself obviously entails that democracy should not merely mean majority government.⁸⁹ Two other important judgments of the South African courts in which democracy was touched upon, are *Doctors for Life International v Speaker of the National Assembly* and *Matatiele Municipality v President of the RSA*.⁹⁰ The constitutional provisions pertaining to the present issue, namely sections 59(1)(a), 72(1)(a) and 118(1)(a), deal with the constitutional duty to involve the public in the legislative process. These judgments can be regarded as a refinement and polishing of statist democracy – in the interest of the statist order and obviously not as something that effect the disruption or querying of statist democracy.

Courts are, however, in no position to ascribe a meaning to democracy, or to any other legal or political concept, that can bedevil the statist order. Ultimately, the courts are an integral part of the statist order and are in fact primarily engaged in its undisturbed perpetuation. When the courts, including South African courts, pay attention to democracy, for example in the case law earlier discussed, such attention is thus primarily aimed at stabilising the statist order and certainly not to expose it to disruption and fundamental change.

⁸⁵ See AEAM Thomashausen 'Savings clauses and the meaning of the phrase acceptable in a democratic society – a comparative study' (1989) 30 *Codicillus* 61-62 in respect of Canadian case law. The European Court of Human Rights also avoided turning the concept into a problem 62-63.

⁸⁶ PW Hogg 'Section 1 of the Canadian Charter of Rights and Freedoms' in A de Menstrai *et al* (eds) *The limitation of rights in comparative constitutional law* (1986) 17; Tenekideis (n 54 above) 30-34.

⁸⁷ 2003 2 BCLR 128 (CC) 140 G-H (para 42).

⁸⁸ (n 87 above) para 43.

⁸⁹ See further the comments of Chaskalson P in *S v Makwanyane* 1995 6 BCLR 665 (CC) at 703F-I (para 88).

⁹⁰ In *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) and *Matatiele Municipality v President of the RSA* 2007 1 BCLR 47 (CC) respectively.

Since the procedural-structural content of democracy is, in principle, faithfully observed, democracy is cautiously being accommodated in conformity with the requirements of the statist paradigm. In at least three respects democracy pays homage to existing statist practice. In at least three respects it provides the rampart for the maintenance of the existing statist order. That is where the spotlight will now be focused on.

2 Democracy as legitimacy fiction

At the turn of the millennium, democracy had fully established its status as a criterion for legitimate government. Any government elected in terms of the principles of a procedural multiparty democracy would normally, by definition, be regarded as legitimate, thereby earning the right to govern. HB Mayo states this as follows:

The election results invest representatives and decisions with legitimacy. In short, the government which is produced — almost as a by-product — invested with legitimacy is the chief social purpose of the whole electoral process.⁹¹

The flipside of this is that the overthrow of a government elected in such fashion will, by definition, be illegitimate. This reality does not only obtain in the Western world, but has gradually been accepted in the non-Western world as well.⁹² The reasoning behind democracy's near self-evident legitimacy lies in the fact that the elected government has earned the support and accord of the people — the state population. The legitimacy of democracy was best revealed in Abraham Lincoln's definition of democracy, encapsulated in his Gettysburg Address, as government of the people, by the people and for the people. In all probability this is the most famous definition of democracy. If a layman were to be questioned on democracy, there is a fair chance that this would be the kind of definition he would furnish. It is, however, more than a lay definition. In 1983 an institution with the authority and prestige of the Parliamentary Assembly of the European Council described democracy in very similar terms, as government of the people by the people.⁹³ Even in academic circles a similar meaning is ascribed to democracy. For example, Barry Holden declares:

⁹¹ Mayo (n 2 above) 73.

⁹² It was manifestly illustrated in the steps taken by both the Commonwealth and the Organisation for African Unity (the present African Union) against governments that had come to power as a result of coups d' état, for example the Commonwealth sanctions instituted against the military Abacha regime in Nigeria, as well as the steps taken against the military regime in Pakistan who had taken over the government after a coup d' état in 1999.

⁹³ Quoted by Jacot-Guillarmod (n 11above) 44.

A democracy is ... a political system of which it can be said that the whole people, positively or negatively, make, and are entitled to make the basic determining decisions on important matters of public policy.⁹⁴

Democracy is therefore legitimate because the people *govern themselves*. However, the discussion of the theory and practice of representative democracy in the first part of this chapter suggest the opposite point of view. The democratic claim that the people govern, is an affable and soothing misrepresentation, for as Giovanni Sartori correctly observes:

Actually, despite all the talk to the contrary, we are moving toward less power of the people. The obvious reason for this is that a maximum of popular power is possible only in simple societies whose leadership-tasks are relatively elementary.⁹⁵

The reality of modern democracy in the large territorial state with its mass population, reveals the notion of a self-governing *demos* to actually be only one of two things. It is either a descriptive myth or demagogic knavery.⁹⁶ It is a fiction that contributes hugely and efficiently to maintaining the reigning order. While everybody remains under the impression that they are participating in self-government, all people are naturally quite satisfied and happy with the present order of statist democracy. The effect of this is that statist democracy therefore remains stable and indemnified against any possible insistence on change. The fiction is successful and everybody profits from it. Although a fiction may thus be in place, it is a good one — a noble lie, as Mayo's puts it:

To talk as though the people actually govern in any modern democracy is to perpetuate a fiction even though we may call it a 'noble lie'.⁹⁷

The phenomenon of the fiction in the legal sense appears in all legal systems, including South African law, which in turn received it from European law.⁹⁸ In the case under discussion, however, we are not really dealing with a fiction in a technically legal sense, but rather with a fiction in a general lexicological sense.

⁹⁴ Holden (n 3 above) 8.

⁹⁵ Sartori (n 6 above) 405.

⁹⁶ Sartori (n 6 above) 128. Various scholars quoted by Sartori (56), such as James Burnham, Sorel, Mosca and Pareto, rejected democracy's claim to bring about self-government as an unattainable myth. However, Sartori himself approaches democracy not merely as a broken reality, but also as an ideal. He regards democracy as self-government not as a false myth, but as a criterion and an ideal worth following. This theme thoroughly permeates Sartori's magnum opus.

⁹⁷ Mayo (n 2 above) 73-74.

⁹⁸ See in general on legal fictions PJJ Olivier *Legal fictions in practice and legal science* (1975).

Legally speaking, a presumption is involved in this instance. A presumption in this sense is simply a means of proving a fact without having to adduce evidence to prove the relevant fact in a concrete sense. By employing a presumption, one therefore assumes a certain fact or condition, without having produced any evidence to substantiate the existence of such fact or condition.⁹⁹ In the present case, it is unnecessary to maintain absolute legally dogmatic purity in respect of the precise delineation of the legal constructs of presumption and fiction. In any event, the two concepts are applied interchangeably in the present context.¹⁰⁰

The crux of the matter is that by employing this fiction, statist democracy pretends to function as a system that actually accomplishes self-government by the people. This is a false pretence. However, the fiction gains apparent substance due to the stereotypical procedures and structures of the representative systems in the modern territorial state. Although the fiction is false, it would nevertheless – as a result of the functioning of these procedures and structures – appear as if democracy's claim of accomplishing actual self-government is genuine and in fact, difficult to rebut.¹⁰¹ Therefore, the message conveyed by this fiction, namely that the people govern themselves, is accepted and abided by. In this way the existing statist order in its present form, is accepted as legitimate, without any criticism worth mentioning. Due to the operation of the fiction pretending that people are governing themselves, the present order is accepted as legitimate and thus avoids any pressure aimed at effecting change. It creates the impression among citizens that they are truly free and consequently the existing order is maintained without any change. Ronald Dworkin¹⁰² formulates it as follows:

We think we are free when we accept the majority's will in place of our own, but not when we bow before the doom of a monarch or the ukase of an aristocracy of blood or faith or skill.

Of course, this fiction is devoid of nobility, especially in a deeply divided heterogeneous state, where the electorate, as reflected to a large extent in South Africa, vote according to their group identities. In such a situation, suffrage and elections function as excuses for the tyranny of the majority over helpless minorities. In these circumstances, elections merely confirm the helplessness of the

⁹⁹ CWH Schmidt *Bewysreg* (1982) 145.

¹⁰⁰ Sartori (n 6 above) 22-23.

¹⁰¹ See Schmidt (n 99 above) 146 who describes the irrebuttable legal presumption as a fiction, thus again emphasising the existing close relationship between fictions and presumptions. Sartori (n 6 above) 22-23 also treats the fiction as an irrebuttable presumption – namely a *praesumptio iuris et de jure*, meaning a legal presumption excluding any proof to the contrary.

¹⁰² RM Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996) 22.

minorities and the overpowering strength of the majority. It exposes the minority to a similar situation that one encounters when a whole population is subjected to the despotism of a tyrant, although it goes even further than that: Due to the application of the legitimising fiction, a deceitful impression of self-government and freedom is created, through which the lamentable condition of majority despotism and minority helplessness is being maintained in an aura of legitimacy.

3 Precariocracy and equality

The overwhelming power of the majority and concomitant majority domination pose one of the lasting problems that confronts democratic theory.¹⁰³ That should indeed be the case, for no matter how good the intentions of a democratic order may be, it is continuously bedevilled by the inherent structural flaws of the tyranny of the majority (majority despotism) and the disregard of minority interests. If the response to these flaws of majority domination and disregard of minority interests would be one of acquiescence, then democracy would not only display defects, but it would forfeit its very purpose. In the nineteenth century, Alexis de Tocqueville was already beset by the potentially tyrannical effects of (majoritarian) democracy.

Mill was fully aware of the risk of majorities abusing their position to the detriment of minorities. Just as a monarchy or an aristocracy can be put to the service of sectional interests instead of the general public interest, democracy can also deteriorate into a tool for serving sectional interests. Mill formulated his fears in this respect by posing the following questions:

Suppose the majority to be whites, the minority negroes, or vice versa: is it likely that the majority will allow equal justice to the minority? Suppose the majority Catholics, the minority Protestants, or vice versa; will there not be the same danger? Or let the majority to be English, the minority Irish, or the contrary: is there not a great probability of similar evil?¹⁰⁴

In Mill's terminology, one of the major dangers inherent in democracy is therefore class government by a numeric majority.¹⁰⁵

Against this background, Mill was of the opinion that there were two kinds of democracy: *first*, there is genuine democracy, which entails government of all the people by all the people. The *second* and

¹⁰³ Sartori (n 6 above) 99-100.

¹⁰⁴ Mill (n 34 above) 249-250.

¹⁰⁵ Mill (n 34 above) 256.

pernicious form is government by the majority, aimed at promoting the interests of the majority. For all practical purposes, only the majority in this dispensation has a say in the affairs of the state.¹⁰⁶ At the same time, the effect of such majority government is to disenfranchise the minority,¹⁰⁷ causing the majority to effectively rule over the minority and usually dominate them. The effect of this is that those belonging to the minority are treated as degradingly *unequal* in comparison to those belonging to the majority. The principle of equality that is termed by Mill 'the root and foundation'¹⁰⁸ of democracy, is thereby ignored and along with that democracy per se is disregarded. Due to the fact that the majority rule over the minority, which consequently does not govern itself, it is self-evident that the principle of self-government will fall by the wayside.¹⁰⁹

Mill then proceeded to argue that the equality principle could best be served by a system of proportional representation. To his mind that would prevent favouring the majority to the detriment of the minority.¹¹⁰

It is to Mill's credit that he realised the evil of majority domination. Mill's cure for the problem was proportional representation. He was convinced that proportional representation would cause the debate taking place in the representative body to reveal the general interest and that that body's choice would be directed at serving the general interest. However, Mill's own belief in his answer to the unsatisfactory phenomenon of majority domination was unfounded. With Mill the notion of minority rights, or rather the protection of minority interests against the tyranny of the majority, was still latent and there was no trace yet of the idea of devolving authority to minorities in order to prevent majority domination and accomplish the equal participation of minorities in democracy.

Of course, one can hardly imagine democracy functioning without the majority principle.¹¹¹ The critical question is therefore, how the majority principle should be reconciled with the equality principle, in

¹⁰⁶ Mill (n 34 above) 256-257.

¹⁰⁷ Mill (n 34 above) 256-257.

¹⁰⁸ Mill (n 34 above) 256-257. See further Sartori (n 6 above) 51 who emphasises that democracy is always based on equality (as well as popular sovereignty and self-government).

¹⁰⁹ Sartori (n 6 above) 51. What is noteworthy, is the fact that the monstrosity of majority domination was already perceived in Classical political thought. Aristotle regularly grappled with the problem in his *Politeia*. See Aristotle *The politics* (translated from Greek by TA Sinclair) (1962) Book III, chapter 8 16; Book III, chapter 10 122; Book IV, chapter 4 160; Book IV, chapter 11 173; Book 5, chapter 8 210; Book VI, chapter 2 236-240; Book VII, chapter 3 262-263.

¹¹⁰ Mill (n 34 above) 257-260.

¹¹¹ As pointed out earlier in chapter 7.1, the majority principle encapsulates the principle of *res iudicata*.

other words, how the majority principle could be implemented without ignoring the equality principle. The ideal situation – as argued in terms of modern democratic theory – is that there should be a continual interchange of majorities. In respect of certain issues, a specific individual could form part of the majority, and with regard to another issue he could be part of the minority. The political order then functions in such a manner that all individuals will sometimes win, and sometimes lose. Then there will indeed be no such thing as *the* majority and *the* minority, but continuously changing majorities and minorities with equally changing compositions. In addition, governments must often replace one another and accordingly modern democratic theory requires that a change of government has to occur at least with every third general election. Should that not happen, a politico-constitutional order cannot be regarded as truly democratic. The effect of this is that parties (majorities) who are governing, will be inclined to compromise in favour of those who are not part of government, because they realise that they may lose a next election, after which they will expect the same compromise orientated approach from the next government – the new majority.¹¹² Within such a scenario all individuals are basically in the same situation, due to the constant interchange of majority and minority positions.¹¹³

However, when there is a permanent majority and minority in a political order, the majority principle has a devastating effect on the principles of equality and of self-government. This happens in particular in communities that are fundamentally divided along ethnic, linguistic, racial, or religious lines where the public discourse concerns itself with, and is often dictated by, the (conflicting) interests of the various component groups. Elections in plural societies so deeply divided are often nothing more than racial or ethnic censuses,¹¹⁴ instead of bona fide elections. In South Africa, where a one-party dominated state has been in place under the ANC since 1994, these types of ethnic censuses are commonplace. This state of affairs, which relegates certain parties (and the groups represented in them) to permanent losers compared with a permanently dominant majority, likewise bedevils the principles of democratic equality and self-government. Due to the disparagement of the equality principle and the principle of self-government, the

¹¹² Holden (n 3 above) 104-106.

¹¹³ For a detailed discussion of this issue, see also K Malan 'Faction rule, (natural) justice and democracy' (2006) *SAPRL* 142 *et seq.*

¹¹⁴ H Giliomee & C Simkins (eds) *The awkward embrace: One party domination and democracy* (1999) xvii.

authentic democratic quality of the system is seriously suspect.¹¹⁵

Viewed from the helpless position experienced by the minority, such a dispensation of majority domination is hardly democratic. On the contrary, it is a system that exposes the minority to an uncertain existence where they are at the mercy of the majority; a system in fact, that infringes on the dignity of individual members of the minority and degrades the minority as a group, in comparison with the majority, brought about by the effective exclusion and helplessness of the minority. Adult people – belonging to the minority – living in a constitutional dispensation in which they are placed in a position, similar to that of minors who lack the full capacity to act, in which they are personally unable to take decisions intimately concerning themselves, and are instead obliged to subject themselves to the decisions taken by the majority, are exposed to systemic infringement of their dignity. Mill formulated this aspect as follows:

It is a great discouragement to an individual and a still greater one to a class, to be left out of the constitution; to be reduced to a plead from outside the door to the arbiters of their destiny, not taken into consideration within.¹¹⁶

He later stated:

Everyone is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny.¹¹⁷

A permanent minority in respect of which the majority makes authoritative decisions, is for all practical purposes excluded from the constitution. Although members of the minority may be enfranchised and can cast their votes, the exercise of their procedural (democratic) rights amounts to nothing more than a ritual through which the legitimacy fiction gains credibility and through which domination by the majority is legitimised and entrenched.

Such a minority may be consulted and may be enfranchised and in fact cast their votes, but their opinions and needs that emerge during the consultation or election, need not be taken into account.

¹¹⁵ Accordingly, it is sometimes required with a great measure of justification that a system must undergo regular changes in government, in order to qualify as a credible and authentic democracy. See A Przeworski & F Limongi 'Modernization: Theories and Facts' (1996-1997) *World Politics* 178. See also R Emerson *From empire to nation: the rise to self assertion of Asian and African peoples* (1962) 330-331; Sartori (n 6 above) 239. It also contributes *inter alia* to harming multiparty democracy and preventing it from coming into its full right. For a more detailed discussion of this aspect, see further K Malan 'Political blitz on a constitutional trench' (2005) *SA Public Law/Publiekreg* 397-411.

¹¹⁶ Mill (n 34 above) 216.

¹¹⁷ Mill (n 34 above) 279.

Therefore, the position of such a minority amounts to nothing more than, in Mill's words, *a plead from outside the door*.

In such a dispensation where the majority holds sway, the position of the minority is very similar to the legal construct of a holder at will (*precarius tenens*). The holder at will is the holder (detentor) of movables or immovables of another, which he keeps under his control at his own request for his own use. The owner of the movables concerned may, however, terminate the holder's control at will.¹¹⁸ Therefore, the latter's continued control is dependent on the owner's mercy. The holder at will is entirely dependent on such mercy. For this reason one can therefore aptly describe a dispensation of majority domination as a precariocracy.

Precariocracy, which does not recognise the democratic principles of equality and self-government, is fundamentally undemocratic and obviously immoral, due to the degradation that it subjects the minority to. For that very reason one can agree with WA Lewis, approvingly quoted by Arend Lijphart, when he avers:

... majority rule may be acceptable in consensual societies, but in plural societies it is totally immoral, inconsistent with the primary meaning of democracy, and destructive of any prospect of building a nation in which different peoples might live together in harmony.¹¹⁹

Majority domination and precariocracy are clearly undemocratic, because they leave the *demos*, or at least part of it, without any *kratos*, as they leave minorities — in contravention of the democratic goals of self-government and equality without *self*-government — at the mercy of majority dominance.

The precariocratic vice has attracted keen attention over the last few decades. Nowadays there is a growing acceptance of the fact that suffrage in itself is no longer sufficient to assure democracy. Minorities justifiably demand the right to recognition within the public domain.¹²⁰ Instead of remaining in a position of helplessness, minorities insist on being vested with the power that will enable them to take decisions on matters that concern themselves. Democracy should therefore not simply entail power to the majority and subservience of the minority. This is, however, what democracy deteriorates to when it is based exclusively on the majority principle, thereby completely abandoning the equality principle and at the same time the principle of self-government. It is argued by some that

¹¹⁸ M Kaser *Roman Private Law* (English translation by R Dannenbring) (1984) 106.

¹¹⁹ WA Lewis quoted by A Lijphart *Democracy in Plural Societies: A Comparative Exploration* (1977) 145.

¹²⁰ CS Maier 'Democracy since the French Revolution' in J Dunn (n 14 above) 146.

democracy should be extended within the framework of liberal democracy.¹²¹

Democracy must be intensified and be extended to not only make provision, in conformity with state building (see the previous chapter), for the one-dimensional state citizen whose identity is determined according to the needs of the state. Democracy should also take the plurality of society and the large amounts of identities contained in it, into account and create an opportunity for its development, instead of subjecting it to the domination of the majority.¹²²

It must be accepted that national homogeneity can no longer be the foundation of citizenship in a pluralistic state and that space should be created for the recognition of a multiplicity of ethnic and cultural identities.¹²³ Then it would become possible to recognise the integrity of minority communities in a real sense and for minorities to be treated on the same footing as majorities and participate actively in exercising self-government.

This plea for a review of democracy is not only targeted against the outrage of majority domination, but also against the state-(nation-)building projects that aim to impose a single state-instigated identity, as described in chapter 6. Consequently, the democratic principle of equality will then be fending off both majority domination and state-building projects.

At a practical constitutional level, efforts are currently being made, in different ways and with ranging measures of success, to restrict majority domination and accomplish equal democratic participation for everyone. In this regard, consociative democracy, as advanced Arendt Lijphart, is one of the much discussed strategies. It assumes a *grand* coalition of all groupings within a plural state, represented by the political elite of each group. According to this system, each group has a veto right with regard to matters of singular importance to such group; there must also be a proportional representation of each group in the public sector; and there has to be segmental autonomy in respect of matters pertaining to every group.¹²⁴

¹²¹ Mouffe (n 68 above) 3.

¹²² To quote C Mouffe (n 68 above) 5: 'The individual is not to be sacrificed to the citizen; and the plurality of forms of identities through which we are constituted and which correspond to our insertion in a variety of social relations, as well as their tensions, should be legitimized.'

¹²³ Mouffe (n 68 above) 8.

¹²⁴ Lijphart (n 119 above) 25-52.

Another escape mechanism lies in the protection of minority rights, which has strongly emerged since the last decade of the twentieth century.¹²⁵ Finally, territorial and functional federalism, constitutional strategies for the devolution of legislative and executive authority to groups and territories, as well as the successful establishment of new states by way of secession are becoming more and more attractive.

Noncompliance with the democratic principles of equality and self-government remains one of the unresolved defects of statist inspired democracy. This defect has long been concealed by the misleading legitimising fiction of procedural democracy. For a long time the procedural franchise has concealed the powerlessness, detrimental inequality and lack of self-government suffered by minorities and has shielded it against criticism. The lack of recognition of equality and the maintenance of precariocracy have now been clearly revealed as the twofold defect dogging democracy in terms of the statist paradigm. Although the pathology has been identified, the search for a cure has barely commenced.

4 Massocracy – democracy of the territorial state

Up to this point we have indicated what statist democracy entails and how democracy has been domesticated according to the needs and dictates of the statist paradigm. In addition, we have explained the lamentable moral condition of such democracy, measured in terms of the true democratic criteria of equality and self-government. This, however, is not where the inherent difficulties with statist democracy end. If we were to proceed from some of the basic assumptions of democracy and apply them to the present-day statist democracy, we shall find that we are presently not only confronted by certain wrong tracks leading from democracy, but that democracy in itself has indeed foundered. In short, statist democracy is democracy no more.

The critical criterion to be applied here, is the concept of demos (people). It is the true key to democracy, because the very reason and aim of democracy is the empowerment of the demos (instead of a dictator, the aristocracy, military junta or whatever) with kratos.

Greek, or rather Athenian, democracy was organised within a restricted geographic dispensation. It functioned in the popular assembly (*ecclesia*), which met regularly and in which all the

¹²⁵ See for example HA Strydom 'Minority rights protection: Implementing international standards' (1998) *SAJHR* 375 *et seq.*

important decisions affecting the Athenian polis were taken. Democracy within the polis was a visible and concrete reality.¹²⁶ All Athenian citizens (*politai*) had sitting in the *ecclesia*. All of them could participate in the discussions and were often involved in executing the decisions of that body. As a result, a large number of Athenian citizens gained experience of political decision-making and the execution of such decisions.¹²⁷ The Athenian democracy was organised within the confines of a territorially limited area and a close-knit community of citizens. The polis dispensation was characterised by what can be described as narrowness of space.¹²⁸

Due to the fact that Athenian democracy was almost exclusively exercised in the popular assembly to which all citizens had access, it was a face-to-face democracy in the fullest sense of the word.¹²⁹ First and foremost, Athenian democracy meant the gathering of Athenian citizens within the popular assembly.¹³⁰

Within Athenian democracy the *demos* were not just theoretically entitled to make decisions; the *demos* did in fact make the decisions.¹³¹ Athenian citizenship was not primarily a legal status, akin to modern citizenship, but direct participation in the affairs of the *polis*. Accordingly, the Athenian notion of citizenship differed from the liberal view of the concept, which accentuates individual autonomy. It rather denoted the freedom to participate in the affairs of the *polis*. Freedom provided the access, within the framework of the *polis*, to having a joint say in the affairs of the *polis*. In terms of Athenian view, freedom beyond the *polis* was unthinkable.¹³²

Participation in politics under the Athenian democracy also differed completely from such politics in representative systems. All Athenian citizens, or at least all citizens who were interested, could participate in the popular assembly. In view of the high regard in which the *politai* held the general affairs of the polis, attendance during sittings of the popular assembly was normally very good.¹³³ Political leadership positions in the polis were earned and retained on merit. The phenomenon of relative certainty of office in modern constitutional democracies was totally unheard of in Athens. Someone

¹²⁶ Sartori (n 6 above) 20.

¹²⁷ Finley (n 17 above) 18-21.

¹²⁸ Finley (n 17 above) 50.

¹²⁹ De Benoist (n 1 above) 70.

¹³⁰ De Benoist (n 1 above) 71.

¹³¹ Holden (n 3 above) 10.

¹³² De Benoist (n 1 above) 72. We encounter the obverse in negative freedom explained for instance by Isaiah Berlin. On this, see the discussion in chapter 6.

¹³³ MH Hansen 'How many Athenians attended the *Ecclesia*?' (1976) 17 *Greek, Roman and Byzantine Studies* 130 (quoted by CA Van Rooy *Antieke Griekse Geskiedenis: Van die Steentydperk tot die eeu van Perikles* (1979) 295) estimates that about 6000 citizens out of a possible number of 35 000 attended the *Ecclesia* in 480 BC.

became a leader solely on account of his personal qualities. Retaining one's political leadership position demanded enduring effort and good performance.¹³⁴ The retention of one's leadership position was therefore uncertain and precarious. There was no government (in the sense of fixed institutions) in the modern sense of the word, that was clearly distinguishable from the rest of the citizenry.

A political elite – a political aristocracy – did in fact exist, but its composition changed all the time. It was constituted and reconstituted time and again. Its 'membership' also depended on enduring good performance. No leader was protected against his office. If one failed to perform well, your days were immediately numbered. There was no need to await the next election.¹³⁵

In Athenian democracy, debating and negotiating were key attributes of the *ecclesia*. For that very reason rhetorical genius was an indispensable asset and orators played a key role in the political process.¹³⁶

Modern democracy turns the focus to the individual and is mainly concerned with the way in which individuals, jointly or severally, are able to apply political power mechanisms to serve the realisation of private interests.¹³⁷ On the other hand, Athenian democracy was mainly concerned with the affairs of the *polis* as an organised community.¹³⁸ The meaning of and need for cementing every individual into the communality of the *polis* community was a fundamental trait of Athenian democracy. Democracy was in fact only exercised with regards to the affairs of the *polis*.¹³⁹ The Athenian concept of equality (*isonomie*), on which the concept of democracy was conditional, was also a typical characteristic of Athenian democracy and distinguishes it from modern statist democracy, for it was not constructed on some or other ontological equality according to natural law, but on the equal identification of Athenian citizens with the *polis*.¹⁴⁰

The differences between Athenian and modern democracy are therefore much more fundamental than the mere fact that the former was direct, while the latter is representative. Each displays a different approach to man, the world and social ties. Whereas

¹³⁴ Finley (n 17 above) 61.

¹³⁵ Finley (n 17 above) 62.

¹³⁶ Finley (n 17 above) 38-75. For this very reason democracy is still mainly associated with a form of government in terms of negotiation and persuasion. See for example JH Hallowell *The moral foundation of democracy* (1954) 60; Holden (n 3 above) 116.

¹³⁷ See for example Wood (n 80 above) and Arendt (n 81 above).

¹³⁸ De Benoist (n 1 above) 71.

¹³⁹ De Benoist (n 1 above) 73.

¹⁴⁰ De Benoist (n 1 above) 73.

Athenian democracy was communitarian and holistic, modern democracy is individualistic. Athenian democracy defined citizenship in terms of the origins of the citizens of the *polis* and made provision for active civic political participation in the affairs of the *polis*. In contrast, modern democracy engages with citizens as atomised individuals, viewed through the prism of abstract egalitarianism. Athenian democracy was founded on the notion of an organic community, in contrast to modern democracy's focus on the realisation of individual interests.¹⁴¹

But who was the *demos* – the citizenry – of Athenian democracy and to what extent did it differ from the *demos* of contemporary democratic practice? In the first place, not all individuals, nor even all adult individuals, were *politai* of the Athenian *polis*. On the contrary, only a fraction of the population of the *polis* belonged to the *politai*. Foreigners and women were excluded. Slaves, who were vast in numbers, were likewise not fortunate enough to be afforded the status of *polites*.¹⁴²

To this one might add: the Athenian *demos* was homogeneous.¹⁴³ To a certain extent *demos* and *ethnos* were one and the same thing.¹⁴⁴ The most essential characteristic of Athenian citizenship was a person's origin and descent. Due to rules that were introduced by Pericles in 451 BC, a new qualification for Athenian citizenship came into force, namely that both one's parents had to be Athenian citizens.¹⁴⁵

Athenian citizenship acquired its value in the powers, functions and activities that were vested in it. The functions and activities of citizenship flowed directly from the status of Athenian citizenship. In contrast with the status of the *polites*, there was also the status of noncitizens, called the *idiotes*. Citizenship was exclusively acquired through birth and descent. Citizenship in the full sense of the word entailed that the citizen had a common fatherland and history (historical experience). A person was born an Athenian citizen and, save for a few exceptions, it was not possible to *become* an Athenian citizen. Furthermore, Athenian tradition frowned upon marriages entered into between Athenians and non-Athenians.¹⁴⁶ De Benoist summarises this as follows:

Only birth conferred individual citizenship. Democracy was rooted in the autochthonous concept of citizenship, which ultimately linked its

¹⁴¹ De Benoist (n 1 above) 74-75.

¹⁴² Holden (n 3 above) 14; De Benoist (n 1 above) 71.

¹⁴³ Finley (n 17 above) 36; De Benoist (n 1 above) 71, 75.

¹⁴⁴ De Benoist (n 1 above) 71.

¹⁴⁵ De Benoist (n 1 above) 71; see further Van Rooy (n 133 above) 285.

¹⁴⁶ De Benoist (n 1 above) 71.

performance to the origins of those who exercised it. Athenians of the fifth century celebrated themselves as the 'autochthonous people of the great Athens.' Into that founding myth they grounded their democracy.¹⁴⁷

Although the statement that Athenian democracy was a direct democracy is true, directness was not its essential trait. Athenian democracy was primarily associated with the notion of a mainly homogeneous community, with a consciousness of what characterises them as a people (or rather as a mainly ethnic *demos*). The proper functioning of Athenian democracy was accomplished by firm common cultural ties and a clear experience of a common descent.¹⁴⁸

In contrast to the homogeneity, the insistence on common descent and the organic holism of the Athenian *demos*, one finds the *demos* of our own day. Nowadays, *demos* simply refers to *everyone*: an ever-growing fluctuating, amorphous crowd of people, reflecting an increasing tendency towards being a society (*Gesellschaft*) and an ever diminishing propensity for being a community (*Gemeinschaft*). The present-day *demos* comprises of an extremely unstable, atomised and norm-free number of people within the territorial state. This can be ascribed to the immense size of the modern territorial state, which has of course, been reinforced over the last few decades by the free flow of capital and people across borders, brought about by economic globalisation. It simply is completely different from the Athenian *demos* and Athenian democracy.¹⁴⁹

Should classical democracy be accepted as a criterion, it is quite evident that the appellation, *democracy*, renders a totally improper description of the present-day meaning of *democracy* nowadays. *Demos-kratia* no longer constitutes a good description of the present state of affairs in what, according to Sartori, should be called the huge *megastate*. (The specific term employed here by Sartori, is *megalopolis*).¹⁵⁰ It has therefore become imperative to update the concept in order to accomplish a more accurate description of the current state of affairs. The unstable, atomised and heterogeneous *masses* who are avidly engaged in realising their own interests in the *megalopolis* (the large territorial state), has replaced the (ethnically) homogeneous organic-holistic *demos*. Therefore, *massocracy*, instead of *democracy*, is currently a more apt description of our modern democratic systems.¹⁵¹

¹⁴⁷ De Benoist (n 1 above) 71.

¹⁴⁸ De Benoist (n 1 above) 75.

¹⁴⁹ Sartori (n 6 above) 20-21.

¹⁵⁰ Sartori (n 6 above) 21.

¹⁵¹ Sartori (n 6 above) 21; see also Holden (n 3 above) 27.

Judged by the classical Athenian criterion of democracy, what we have nowadays is not a democracy at all, but rather a massocracy. And yet, the ironic situation now presents itself, in which the following ‘illogical’ *logic* is being pursued: Instead of referring to the Classical democracy standard to draw the conclusion that the present system is not democratic, contemporary massocracy is applied as a democratic standard to draw the conclusion that Classical Athenian democracy was undemocratic.¹⁵²

Allain De Benoist thoroughly debunked this illogical argument.¹⁵³ He pointed out that modern political regimes have only fairly recently started to regard themselves as democratic.¹⁵⁴ It would therefore be totally wrong to conclude that the Athenians were not democratic, once we realise that they differed from us. The precise opposite is in fact correct: in so far as current practice does not conform to Athenian usage, we are indeed undemocratic, and not the Athenians.¹⁵⁵

The blame for the present reversing of logic cannot be assigned to Mill – the founder of contemporary democratic theory. In fact, Mill still required a great measure of homogeneity of the *demos* to ensure successful democracy. Mill was much more of an adherent of the authentic democratic tradition than many of the contemporary theorists who are not true democrats but who must rather be regarded as exponents of false doctrines of democracy, like massocracy. Without any semblance of doubt, Mill founded his philosophy on the basis of the thesis of a homogeneous *demos*. In this respect he declared:

But when a people are ripe for free institutions, there is a still more vital consideration. Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government cannot exist.¹⁵⁶

Free institutions can barely endure in a heterogeneous society in which diverging groups experience the same event in different ways and in which one and the same occurrence has a different effect on different groups. In Mill’s words:

¹⁵² Holden (n 3 above) 27.

¹⁵³ De Benoist (n 1 above) 74.

¹⁵⁴ De Benoist (n 1 above) 74. The statement is confirmed by the total lack of understanding of the term ‘democracy’ by scholars like Tom Paine and the near complete avoidance of it by JS Mill (n 34 above). See the first part of this chapter.

¹⁵⁵ De Benoist (n 1 above) 74.

¹⁵⁶ Mill (n 34 above) 361.

The same incidents, the same acts, the same system of government, affect them in different ways; and each fear more injury to itself from the other nationalities, than from the common arbiter, the state.¹⁵⁷

Accordingly, Mill declared that free institutions would only be viable when each people has its own state:

... it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities.¹⁵⁸

One therefore discovers much of the authentic democrat in Mill. The decline of democracy into the contemporary massocracy of the territorial state, forced into the straitjacket of the statist paradigm and in accordance with its needs and dictates, would only follow in the twentieth century. Our thinking has apparently been so distorted by the doctrines of the statist paradigm, which presents us with the illusion of massocracy as the equivalent of true democracy – that it has taken us nearly a century to see the massocratic wrong for what it actually is.

¹⁵⁷ Mill (n 34 above) 361.

¹⁵⁸ Mill (n 34 above) 362.

CHAPTER 8

HUMAN RIGHTS - THE CARING STATE

1 Symbiosis

Not only are we currently living in an era of eminent democracy, but also in an era of human rights. The notion of human rights is the idea of our times – the only politico-moral ideal (apart from democracy) that enjoys universal acceptance.¹ As with democracy, there is an almost universal support for human rights.²

Human rights saw the light of day at the same time that the territorial state announced its arrival on the historical stage.³ Since then the destinies of both the state and human rights have been inseparable.

It is generally accepted that individual persons are the holders and beneficiaries of human rights. Broadly speaking, this is correct, but not entirely true, because the state, being obliged to satisfy human rights in terms of the human rights relationship, derives benefits from human rights which are as extensive, if not more so, as those enjoyed by the individual. This will now be explained in more detail.

An assertion that the state is reinforced by human rights and enjoys the benefits of human rights in equal measure as individuals, may at first blush strike one as rather strange. According to common doctrine a regime and culture of human rights exist for the purpose of restraining the state in order to benefit the individual and render the state subservient to the individual. Although this may be true, it must be remembered that the recognition of human rights always presupposes the existence of the state. Without the state no human rights relationship is possible. The state is an essential part of such relationship. Human rights entail a number of demands from the state

¹ L Henkin *The Age of Rights* (1990) ix; R Dagger *Rights in T Ball et al (eds) Political Innovation and Conceptual Change* (1989) 292.

² Editorial note (1984) 113 Daedalus 'Human Rights Issue' iv.

³ Dagger (n 1 above) 298.

and therefore the state is an indispensable entity in any legal dispensation where human rights are recognised.⁴ Karel Vasak accordingly declared an organised community in the form of the state to be a basic precondition for realising human rights.⁵ To this he added that humans cannot be truly free in the absence of the state.⁶

This clearly shows that human rights are fully integrated into the statist paradigm. Human rights do not threaten the state; on the contrary, they emphasise and confirm the state as an indispensable *conditio sine qua non* for our daily existence. In human rights the state has found a staunch ally in the reinforcement and entrenchment of the state.

Human rights are refined and administered by the legal profession in particular. The layman will usually experience difficulty to enforce his rights in person. To accomplish that, he must normally rely on the assistance of legal practitioners, either in private practice or employed by state institutions. He is unable to enjoy the advantages of human rights without the assistance of an attorney, advocate, judge and/or a range of other legally qualified persons involved in the administration of justice. The more rights available, the greater the possibility of enforcing them and the greater everybody's dependency on the legal profession.

Against this background, the focus shifts to the state's strategic ally and joint beneficiary of the human rights regime, namely the legal profession that has been gaining ever more functions as the number of rights have steadily increased and whose client base continues to grow with the addition of every new right.

Individuals are the first and obvious beneficiaries of human rights. Behind this, however, lurks an even more profound truth, namely that the state and the legal profession derive at least an equal amount of benefits from human rights and have at least as much reason to recognise new rights and provide mechanisms for their protection.

2 Tracking the development of human rights

In chapter 4 we explained the individual right to religious freedom as the prototypical human right. It came into being when the territorial state was established and endowed the state with one of its fundamental traits, namely that of religious neutrality. Religious

⁴ F Venter 'Menseregte, groepsregte en 'n proses na groter geregtigheid' (1986) 1 *SAPR/L* 206.

⁵ K Vasak *et al* 'Human Rights: As a Legal Reality' in K Vasak *et al* *The International Dimension of Human Rights* (1982) 4.

⁶ Vasak (n 5 above) 4.

freedom and the incidental religious neutrality of the state were conditional to the stability of the state. Religious freedom as a basic human right and the security of the state were mutually dependent. In this way a symbiosis came about that would serve as a precedent for the infinitely more comprehensive modern symbiotic relationship between the state and human rights, a topic which we shall discuss next.

However, according to the traditional view, human rights originated in the struggle against absolutism during the seventeenth and eighteenth centuries.⁷ That resulted in agreements between sovereigns and their populations – in reality the aristocracy – with a view to grant the population certain rights in the form of freedoms and to prohibit the authorities from breaching such freedoms.⁸ The first human rights were therefore mainly immunities against arbitrary government interference.

Originally, human rights defined the relationship between government and subject in a manner that demarcated a specific sphere of freedom for the subject, on which the authorities were not allowed to encroach.⁹

The first rudimentary human rights documents made their appearance in England, where a drawn out struggle against absolutism persisted during the seventeenth century.¹⁰ The Petition of Rights of 1628 restricted arbitrary government conduct, the Habeas Corpus Act of 1641 prevented government from wrongfully detaining a person and the Bill of Rights of 1689 endeavoured to entrench a variety of rights and liberties of the citizenry against infringement by the authorities. However, a comprehensive catalogue of basic rights still did not exist. Another century was still to pass, during which the middle class could become firmly established and liberal political and economic conceptions could take root, before comprehensive human-rights declarations would see the light.

The triumphal procession of human rights commenced with the Virginian Bill of Rights of 12 June 1776, followed by the first ten amendments to the Constitution of the United States of America and the French Declaration of the Rights of Man and the Citizen of 1789.¹¹

⁷ M Cranston 'Are there any human rights?' (1984) 113 *Daedalus* 2; DE de Villiers 'Die geskiedenis van menseregte' in DA du Toit (ed) *Menseregte* (1984) 22.

⁸ I Szabo 'Historical Foundations of Human Rights' in K Vasak *et al* *The International Dimension of Human Rights* (1982) 13.

⁹ Szabo (n 8 above) 13.

¹⁰ JD van der Vyver *Die Beskerming van Menseregte in Suid-Afrika* (1975) 20-21.

¹¹ At one stage the question was debated whether the Virginia Bill, or the French Declaration could lay claim to the status of being the original human rights document. See K Stern 'The Genesis and Evolution of European-American constitutionalism' (1985) XVIII *CILSA* 192.

Eventually the American Bill of Rights, as supplemented by the Civil War amendments of 1868, and the French Declaration had a profound and lasting impact: the American Bill of Rights, because it served as a model for many other constitutional human rights bills and was further developed by judicial review; the French Declaration, because it served as an example for the constitutions of Belgium, Germany, Austria, Greece, Romania, Switzerland, Italy and the erstwhile French colonies.¹²

During the revolutionary period in France and the USA in the last quarter of the eighteenth century, a considerable interchange of revolutionary ideas took place between England, the USA and France. Prominent figures also profited from one another's experiences. For example, Lafayette, one of the drafters of the French Declaration of the Rights of Man and the Citizen, found himself in the USA at the time when the American Declaration of Independence was prepared. He was also a friend of its main author, Thomas Jefferson, who in turn was the American ambassador in France in 1789. It is a well known fact that Lafayette discussed the drafting of the French Declaration with him.¹³

Although there are obvious differences between the two documents – the French bill was formulated in much more ideological terms than its empirically orientated American counterpart – one can also perceive a great measure of similarity.

Both documents endeavoured to establish the integrity of an individual private sphere, which had to be immune to state infringement by emphasising the right to individual freedom. True to the common law tradition, the American Constitution protects the procedural rights of the accused. Individual freedom is also the central value of the French Declaration, in which various aspects of individual freedom are entrenched. The French Declaration, deviating from the American Constitution in this respect, also emphasises the right to equality and the protection of property. (The right to equality was only finally entrenched in the American Constitution by amendments prompted by the American Civil War).¹⁴

Both the French and the American bills reflected the values of early capitalism and the concomitant interests of the emerging middle class.¹⁵ With the enactment of the French and American bills, the middle-class revolution was represented in what is generally

¹² AP Blausten *et al Human Rights Source Book* (1987) 727; De Villiers (n 7 above) 20.

¹³ Blaustein (n 12 above) 743; De Villiers (n 7 above) 19.

¹⁴ Blaustein (n 12 above) 740-745.

¹⁵ See for example Blaustein (n 12 above) 743 and De Villiers (n 7 above) 22.

known as first generation (civil and political) human rights, in which the values and interests of middle class individualism are entrenched.

The type of duty to which government was subjected in terms of these rights, was not to perform positive acts as such, but rather to refrain from certain actions – namely, infringing upon the individual domain of freedom.

One can justifiably assert that human rights have two aims: first, to protect personal interests against government's abuse of power, by employing institutional methods; secondly, to enhance basic living conditions and to develop the human personality in various ways.¹⁶

The type of rights represented in the French and American bills, resort under the first component of this definition. The first component reflects the notion of the minimal state, namely the *nightwatchman* state. The second part represents the opposite conception of the state, namely that of the encroaching state that actively intervenes in the affairs of its inhabitants.

The need for the latter type of state only emerged in the nineteenth century, when the economically developed world was confronted by the socially abusive and defective consequences of the industrial revolution. The problem was initially addressed by means of socio-economic legislation, but was gradually accounted for by recognising a number of socio-economic interests as basic human rights.

In the urbanised industrial state where people live as individuals, everybody's labour became their only means of ensuring economic survival and continued existence. It differs from an earlier era in which populations were much smaller, when direct access to land enabled people to maintain small-scale economies of subsistence, either through agriculture or by hunting and gathering, to assure their survival. In the industrial era, more so than in any preceding period, you could only sell your labour to ensure your survival. If one could not achieve that, or if your employment contract did not sufficiently protect you and could be summarily terminated, you had nothing to rely on. This gave rise to abject poverty. A specific characteristic of the early industrial era was the dearth of permanent employment contracts. Labour was sold as temporary piecework and could therefore not guarantee lasting security. The socially unsafe and exposed circumstances that surrounded the working masses were addressed for the first time in Bismarck's Germany, where legislation was enacted in the 1880's to make provision for unemployment

¹⁶ Szabo (n 8 above) 11.

insurance in the event of illness, occupational accidents, old age and disability.¹⁷

The effect of these measures was that restrictions were imposed on property rights and the contractual freedom of employers. The reason why these measures could be taken for the first time in Germany without eliciting fierce capitalistic opposition, was to be found in the relatively weak position of liberalism in that country.¹⁸ However, shortly afterwards similar measures were to follow in both France and Britain.¹⁹

The first breakthrough in favour of socio-economic rights as constitutionally entrenched human rights, alongside civil and political rights, occurred in 1917 when the Mexican constitution was enacted, as well as when the constitution of the Weimar Republic was adopted in 1919.²⁰ The Mexican constitution included, for example, measures restricting ownership of and distribution of land. The right to work and also the right to fair working conditions were also recognised as fundamental rights.²¹

Recognition of such second-generation rights – also known as red rights, due to their socialistic flavour – provided the real foundation for the second part of the definition of human rights, referred to earlier.²² In order to maintain individual freedom, government was required not only to refrain from taking certain actions, but had to take active measures to ensure better living conditions and social security.

Second-generation human rights have since been included in many national constitutions, either as full-fledged fundamental rights on the same basis as first-generation rights, or as so-called *directive principles of state policy*, as reflected in the Irish, Indian and Namibian constitutions.²³

Human rights have also been established to such an extent in international law that it presently forms one of the main components

¹⁷ GV Rimlinger 'Capitalism and Human Rights' (1984) 113 *Daedalus* 55.

¹⁸ Rimlinger (n 17 above) 55.

¹⁹ Rimlinger (n 17 above) 57-58.

²⁰ Szabo (n 8 above) 19.

²¹ Blaustein (n 12 above) 749-750.

²² On this nomenclature, see A Eide (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) and the authors referred to therein.

²³ On this, see *inter alia* B de Villiers 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 *SAJHR* 29 *et seq.* These directive principles are not directly applied, as in the case of the normal course of events) first-generation rights contained in a bill of rights. These are not rights to be directly enforced in the courts. They do, however, function as a method of interpretation in favour of the realisation of socio-economic rights and, if need be, also as a restriction on and qualification of first-generation rights.

of that discipline. This is illustrated, among others, in the content of textbooks on international law. As part of the law dealing primarily with interstate relations, textbooks on international law published until the early 1970's either ignored human rights completely or scarcely referred to the topic. Nowadays human rights, provided for in international legal instruments, occupy a prominent position in the study of and literature on international law.

Before the Second World War, there was only limited international recognition of human rights. The International Labour Organisation started developing minimum standards for the workplace.²⁴ The only remaining pre-Second World War recognition of human rights was the provision made for the protection of ethnic and religious minorities in Central Europe. This protection obtained in terms of international treaties that were concluded after the end of the First World War. The League of Nations guaranteed its enforcement.²⁵ However, the founding convention of the League of Nations contained no general provisions on human rights.²⁶

Due to the efforts of the United Nations, human rights have been developed into a comprehensive international system since the end of the Second World War. Human rights have been standardised and universalised in minute detail.²⁷

The Charter of the United Nations, upon which this organisation was established in 1945, already contains in itself a solemn commitment to the enhancement of respect for human rights, without regard for language, race, gender or religion.²⁸ In addition, as one of its own basic commitments, as well as that of its member states, the Charter provides that human rights must be respected and that all member states are jointly and severally obliged to implement measures to enhance human rights.²⁹

Shortly thereafter the UN's commitment to human rights was confirmed by the acceptance of the Universal Declaration of Human Rights by the General Assembly in 1948. As a decision of the General Assembly of the UN, this resolution does not create binding treaty law. It is not a multilateral convention and therefore member states are not bound to observe it under to international treaty law. Even so,

²⁴ T Buergenthal *International Human Rights: In a Nutshell* (1995) 9-10; Eide (n 22 above) 27-28 mentions the interesting fact that second-generation rights in the form of minimum standards were recognised in the labour field even before first-generation rights had been recognised in international law.

²⁵ Buergenthal (n 24 above) 10-13.

²⁶ Buergenthal (n 24 above) 7.

²⁷ Buergenthal (n 24 above) 21 correctly states that modern human rights are a post-Second World War phenomenon.

²⁸ Article 1(3) of the Charter of the United Nations, 1945.

²⁹ Articles 53 and 56 (n 28 above).

it is of singular importance to the international human rights system for at least two reasons.

In the first place, it has gained enormous influence. It enjoys almost universal recognition, making it barely conceivable that a state would openly reject its content. Although resolutions of the General Assembly in principle merely enjoy recommendatory status, it is certainly not the position with regard to this resolution. It is widely held that its content has already – as international customary law – gained the status of binding law.³⁰ Even though this opinion does not hold true for the entire declaration, it is at least valid in respect of certain key principles of the Declaration, which comply with the requirements of international customary law.³¹

The second reason is to be found in the comprehensive nature of the Declaration. It contains a catalogue of all the first-generation freedoms, including the right to equality, the right to a fair trial, the right against detention without trial, the right to property, the right to freedom of movement, thought, religion, expression and the right to assembly. In addition it also contains a number of second-generation socio-economic rights: the right to work, fair working conditions and fair remuneration, the right to a basic standard of living, food, clothing, housing and medical, social and old-age care, as well as the right to basic education.³²

The General Assembly has thus fully recognised socio-economic rights in addition to civil and political rights. As a result, the principle of interdependency of rights, which has become trite in the meantime, has been confirmed.³³

When the Universal Declaration was adopted, there were no binding international human rights yet. Subsequently, the need to transform the avowals of the Declaration into binding conventional law arose. Initially only one convention was envisaged for this purpose. However, the ideological tension at the time between East and West prevented it and two draft conventions were finally approved by the General Assembly in 1966. Once the required number of member states had approved them, the two instruments came into operation in 1976.³⁴ The International Covenant on Civil and Political

³⁰ J Dugard *International Law: A South African Perspective* (2005) 315.

³¹ Dugard (n 30 above) 315. The declaration probably complies in most respects with the *opinion iuris* requirement of international customary law, but not with the *usus* requirement. On this requirement, see *inter alia* Dugard (n 30 above) 29-33; H Booysen *Volkereg en sy verhouding tot die Suid-Afrikaanse reg* (1989) 48-50.

³² Articles 24 to 26 of the Universal Declaration of Human Rights contain the socio-economic rights referred to.

³³ The principle was confirmed by the General Assembly of the UN in 1950. See Eide (n 22 above) 15.

³⁴ Dugard (n 30 above) 316.

Rights catalogues all the traditional basic civil and political rights and freedoms: the right to life,³⁵ the right against torture, cruel, degrading and inhuman punishment and treatment, the right against slavery, the right to personal freedom and security, the right to a fair trial, the right to the principle of legality in criminal law,³⁶ the right to freedom of movement, thought, conscience, expression, assembly and association, suffrage, the right to privacy and the right to equal protection under the law.

The second convention, the International Covenant on Economic, Social and Cultural Rights, makes provision for the right to work, the right to fair working conditions – including the right to fair wages and a healthy working environment – the right to membership of a union, the right to a sufficient standard of living, clothing, housing and gradually improving living conditions, the right to the highest possible standard of living and physical and psychological health, the right to education – including the right to free primary education – and the right to participation in cultural life.³⁷

The main importance of the two covenants is that they burden all parties to the treaties with peremptory obligations in terms of international treaty law. In terms of article 2 of both covenants, all state parties bind themselves to respect and ensure the rights recognised in the covenants to everyone within their territories.

One can refer to the two above-mentioned conventions as the general UN human rights conventions, as they contain such a wide range of rights. In addition, human-rights standards have also been formulated in a number of *specific* UN conventions. These include the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2004).

Apart from the international human rights system that was established by way of UN activities, a number of regional systems are also in force:

³⁵ This right was augmented by the Second Optional Protocol of 1989 to the International Covenant on Civil and Political Rights, aimed at abolishing the death sentence.

³⁶ The principle of *nullum crimen sine lege*, meaning that nobody can be prosecuted for an act that was not a crime at the time of its commitment.

³⁷ Jointly the Universal Declaration and the two 1966 Covenants are known as the International Bill of Rights.

- The European system in which the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the European Social Charter (1961) are the leading instruments and subsequent additions (a comprehensively revised Social Charter came into operation in 1999);
- The American system in terms of the American Declaration on the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969);
- The African system in terms of the African Charter on Human and Peoples' Rights (1981).

Against this background it should be evident that the present era is a period of human rights par excellence. Apart from the comprehensive international and regional systems on human rights, the recognition of human rights in national constitutions has grown phenomenally since the end of the Second World War. This had the effect that there is currently barely any modern national constitution left without some or other approving human rights reference.

The functional sphere of human rights would also appear to be insatiable. New interests, not yet defined in human rights terminology, are assiduously being identified and the process of setting human-rights standards is simply never-ending. Minority rights, initially one of the focus areas of human rights, made great strides, especially in the 1990s, after a long interval of neglect.³⁸ In addition, the rights of indigenous peoples and third-generation rights are being subjected to growing scrutiny in the human rights field.

In fact, human rights have now become virtually completely free of any specific ideological content and remain beyond any exclusive ideological preferences or aversions. Just like the natural law of ancient times, human rights are like a sponge and would appear to absorb almost anything that rears its head, irrespective of the ideological discrepancies of those interests recognised as human rights. It is a continuously growing concept that takes account of all human needs in accordance with changing social circumstances.³⁹

Human rights are all-encompassing. They no longer merely contain government's duty to refrain from infringing on political and civil rights, they now also include government's duty to act positively in improving the socio-economic well-being of the state population. It

³⁸ See for example F Benoit-Rohmer *The majority question in Europe: towards a coherent system of protection for national minorities* (1996); HA Strydom 'South African constitutionalism between unity and diversity: lessons from the new Europe' (1997) 12 *SAPR/L* 373 *et seq.*

³⁹ Szabo (n 8 above) 19; De Villiers (n 7 above) 35-36; J Donnelly 'Human rights and human dignity: An analytical critique of the Non-Western conception of human rights' (1982) 76 *American Political Science Journal* 315.

requires careful planning by government, as well as active public involvement to accomplish the fulfilment of socio-economic rights in terms of specific programmes. Louis Henkin remarks:

... international human rights implied rather a conception of government as designed for all purposes and for all seasons.⁴⁰

3 Statist-paradigmatic politics of human rights

Human rights presuppose human needs, which have to be realised by the state. Human rights therefore usually go hand in hand with duties that rest on the state and functions to be performed by the state. It is indeed primarily the duty of the state to accomplish the fulfilment of human rights.⁴¹ The more the human needs are reflected in these rights, all the more the duties and responsibilities of the state will be.

Initially the duties imposed upon the state in terms of first-generation human rights were of a negative – desisting – nature. The state was simply duty-bound to refrain from interfering in a specific domain – the domain of individual freedom. However, with the advent of second generation socio-economic rights, the state has gradually emerged as an active role player and obligated party for the purposes of realising such rights. It is also an everyday phenomenon that human rights instruments obligate governments to change attitudes and thereby act as educators and preachers, as it were. The increasing role of the state in accomplishing social security by fulfilling second-generation rights, has steadily grown in importance since the time of Bismarck.

The changing responsibilities of the state, which placed more emphasis on the growing number of duties in the socio-economic sphere, were embodied in the sociological jurisprudence of Rudolph von Jhering, Eugene Ehrlich and ultimately, Roscoe Pound. They developed the theses that underlie the utilitarian politics of Jeremy Bentham.

Before the nineteenth century, issues such as education, health and welfare were of little interest to the state and the legal system. Stimulated in particular by the work of Jeremy Bentham (1748-1832) and, of course, due to the great social changes that accompanied the industrial revolution, the state has ever since gradually been taking on more and more duties involving issues of this nature. This, in turn, created a need for better government regulation of these matters.⁴²

⁴⁰ Henkin (n 1 above) 6.

⁴¹ Donnelly (n 39 above) 306.

⁴² RWM Dias *Jurisprudence* (1976) 580.

In terms of Bentham's utilitarian principle, it is the function of the law (and the state) to achieve the highest degree of human happiness for each and every individual, in order to ensure optimal happiness for all.⁴³ The utilitarian justification for the necessity of legislation is to be found in the very fact that it is the most important means by which happiness can be assured for the largest possible number of people.⁴⁴ The work of Rudolph von Jhering (1818-1892) is of a similar nature. After having been an adherent of the German historical school, he gradually became convinced of the social function of the law. Probably influenced by the changing socio-economic circumstances of his times, during which period the state progressively emerged as the institution burdened with the task of fulfilling the social needs of a great number of urbanised people, Jhering proclaimed that the law was duty-bound to pursue social aims and especially to react in addressing practical, social and economic problems.⁴⁵

The sociological jurisprudence of Roscoe Pound (1870-1964) further developed these notions. It was aimed at ensuring that the formulation, construction and application of legislation should meticulously take account of and react to the social environment. To attain such end, enduring empirical research needs to be undertaken to ascertain the sociological effects of legislation. Sociological research should precede the promulgation of any legislation, and it must be continued in order to determine how legislation could be made sociologically more effective. In short, a comprehensive sociological study in respect of legislation must continuously be undertaken. In determining the needs to be satisfied by a legal system, a complete inventory of all human needs should be kept. These needs must be satisfied by employing the most optimal legal methods and instruments.⁴⁶

Pound's sociological jurisprudence has to be evaluated against the background of the increasing human (particularly socio-economic) needs of the late nineteenth century and the twentieth century. His legal thinking represents, as it were, legal theory's answer to the socio-economic conditions of that era. It accounts for the multiplication of unsatisfied social needs of that period, ultimately presenting the law as a dynamic and flexible instrument for satisfying such needs. In order to attain this objective, the state obviously presents itself just as prominently as the law itself, for the law is the very instrument applied by the state to accomplish the satisfaction of needs.

⁴³ Dias (n 42 above) 591.

⁴⁴ Dias (n 42 above) 593.

⁴⁵ Dias (n 42 above) 585-588.

⁴⁶ Dias (n 42 above) 596.

Pound's new sociological jurisprudence, in terms of which law must be applied as a socio-economic satisfier of needs, is so common nowadays and takes on such a commonplace appearance that one is tempted to ask whether it has any merit at all as a legal theory. We are indeed living in an era in which the dynamic social role and function of state and law is being accepted as obvious and normal.

Bismarck's social security legislation and the application of similar measures elsewhere in the world can be regarded as the politics of sociological jurisprudence. What Bismarck and other *socially inspired* politicians meant to politics, Jhering, Ehrlich, and especially Pound accomplished on behalf of legal theory.

Sociological jurisprudence is the eminent apologist for second-generation rights. In terms of sociological jurisprudence, there is no place whatsoever for the apathetic libertarian nightwatchman state with its *laissez faire* character. With the advent of second-generation rights, the energetic and omnipresent state — of which the nurturing, educating, healing and employment-providing hand has a daily effect on everyone — also made its appearance.

Human rights have a well-nigh inherent favourable meaning. It is also self legitimising, just like democracy. It almost automatically generates pleasant sensations, for someone entitled to a right is indeed an empowered and worthy person. A legal relationship will always imply both an entitled party and an obligated party, with the former occupying a relative position of power vis-à-vis the latter, in terms of their legal relationship.⁴⁷ When human rights are involved, the state will almost always be the obligated party.⁴⁸ Add to this the fact that human rights have increased tremendously, as explained earlier, and that the state has taken on a plethora of duties, then the picture that arises would seem extremely attractive and pleasing — the picture of an empowered and self-assured individual to whom the state owes a large number of duties in terms of an array of human rights provisions.

However, on the opposite side of this glittering sham, we encounter quite a sombre reality. The dominant socio-economic

⁴⁷ Donnelly (n 39 above) 305.

⁴⁸ Vasak (n 5 above) 27, for example, tells us that in terms of international human rights law the state will always be responsible for realising human rights. This simple truth becomes evidently clear in the case of socio-economic rights. As there normally cannot be immediate satisfaction of these rights as in the event of first-generation rights, they are formulated differently from their first-generation counterparts. Second-generation rights are usually qualified by providing that the state is obliged to accomplish the progressive realisation of these rights, in light of the available resources. See for example article 2(1) of the International Convention on Economic, Social and Cultural Rights, as well as articles 26(2) and 27(2) of the South African Constitution.

forces of our times, including economic growth (without concomitant job creation), urbanisation, increase in population, modernisation, unemployment, globalisation accompanied by an increased shifting of capital and labour across state frontiers, rampant crime, growing pressure on scarce essential resources, ageing populations in need of care, the occasional painful effects of (essentially) strict monetary policies on large sections of the population, the growing gap between the rich and the poor and the like, have stripped individual people of the safe environment of the small, protected communities in which they previously lived. The economic, social and cultural unsettling of traditional communities such as the (extended) family, the home, feudal structures or the tribe, have removed the mutual support that was previously provided by a more close-knit communal existence. To the extent that the state and the liberal-capitalist economy have developed, the individual person has replaced the family and other communities as the focal point of legal intervention.⁴⁹ The development of (atomistic inspired) law has gone hand in hand with the continual process of the destruction of the individual's earlier natural ties with his community and group membership. This gave rise to growing isolation of the individual.⁵⁰ Whereas individuals could earlier rely on the protection of the groups to which they belonged, there has been a steadily increasing tendency that the law, as administered by the state, is assuming a substitutory role as main protector. Larry Diamond aptly summarises this tendency when he explains:

Clearly, the nuclear family in contemporary urban civilization, although bound by legal obligations, has minimal autonomy. It is a reflex of society at large. Obviously, the means of education, subsistence and self-defense are outside the family's competence. It is in this sense that, giving the absence of mediating institutions, having a clearly defined independent authority, the historical tendency of all state structures *vis-à-vis* the individual may be designated as totalitarian. If 'totalitarian' is the state process, totalitarianism cannot be confined to a particular political ideology but is, so to speak, *the* ideology, explicit or not, of political society.⁵¹

Human rights that are guaranteed by the state now make up for the loss of protection caused by the weakening of intermediate social structures and communities.⁵² Jack Donnelly informatively explains in this regard:

⁴⁹ S Diamond 'The rule of law versus the order of custom' in RP Wolff (ed) *The Rule of Law* (1971) 124.

⁵⁰ Diamond (n 49 above) 124.

⁵¹ Diamond (n 49 above) 124.

⁵² Donnelly (n 39 above) 312.

These institutions have created a largely isolated individual who is forced to go it alone against social, economic and political forces that far too often appear to be aggressive and oppressive. Society, which once protected his dignity and provided him with an important place in the world, now appears, in the form of the modern state, the modern economy, and the modern city, as an alien power that assaults his dignity and that of his family.⁵³

In this light it becomes clear that human rights in fact do not bear testimony of an empowered individual. On the contrary, human rights rather furnish a catalogued description of individual people's needs, helplessness, powerlessness and dependence on the state. Human rights attest to a lonely, uprooted individual who, stripped of the support that would have been forthcoming from his membership of an auspicious social structure and a lively communal existence, has been exposed to the mercy of a hopefully omnipresent and efficient state. It affords testimony to the individual who can only trust that the state as his sole refuge will satisfy his needs, which with misleading boldness are paraded as rights.

Opposite to the exposed individual, is the state. The duties and responsibilities of the state have drastically increased as a result of the increasing number of individual rights. Due to the accumulation of rights and the corresponding rise in the number of duties imposed upon the state, individuals have simply become increasingly dependent on the state. Consequently, the state has gradually become more indispensable in the daily existence of individuals, as a direct result of the increase in the number of human rights. The true story of human rights is thus not one of a self-assured and empowered individual pitted against a weakened, but serving state. It is in fact the woeful tale of a needy and dependent individual, standing in a close human rights relationship with a forceful and omnipresent state.

Hobbes' state was an absolutistic state, but it was a frail Leviathan, with an aloof character. He let his subjects be, except in cases of serious breaches of the peace. He was absolutistic, because he was exempt from observing constitutional rules. His aloofness, however, implied that he was not in the slightest sense totalitarian. The state — the mortal god — of the modern human rights regime is, on the other hand, not (officially) absolutistic any more, due to its observance of constitutional rules. The full-grown Leviathan, however, although no longer absolutistic, has shrugged off his youthful detachment. Nowadays Leviathan is totalitarian:⁵⁴ he

⁵³ Donnelly (n 39 above) 312.

⁵⁴ The meaning ascribed to totalitarianism here, follows G Sartori *Democratic Theory* (1962) 47. He associates totalitarianism with a total encroachment on the private domain by the state, the disregard of any difference between state and society and the attendant total politicisation of society.

interferes in various ways in everybody's lives on a daily basis. In observing our welfare, he is encroaching and meddlesome. No domain is immune to his wearisome and loving care. This mortal god – the contemporary state – is benevolently totalitarian and because he is the only one on whom this world can rely, we have no choice but to believe in him. Therefore, he is absolutely indispensable.

Against this background, human rights – the supposed empowerment mechanism of individuals – therefore remain squarely within the statist paradigm. This underscores the thesis of the state as the core entity and has the effect of entrenching the state against any possible assault, due to the individual's utter dependence on the state.

3.1 The specific position of socio-economic rights

The recognition and entrenchment of second-generation rights strikingly illustrate how human rights have been enlisted to underwrite the inviolability of the state, thereby indemnifying the reigning statist order from being dislodged.

Although the living standards of the ordinary rural population were low in comparison to the landed aristocracy during the Middle Ages, they were still better off in terms of social security than the labouring poor of nineteenth-century industrialised countries.⁵⁵ During the Middle Ages, poverty was a natural state, but the social order and its attendant unwritten moral ethos supplied the means to counter at least the worst effects of poverty. It was standard practice to distribute alms.⁵⁶ Feudalism had its own nonlegal forms of satisfying social *rights*, either by means of the feudal lords' performance of their duties, or by the guilds' brotherhood arrangements.⁵⁷ Alexis de Tocqueville already pointed out the differences between the social relationships of the medieval landed aristocracy, on the one hand, and those of the nineteenth-century industrial aristocracy, on the other hand. The landed aristocracy shared many everyday life experiences with their serfs. They were involved in the affairs of their serfs in more spheres of life than labour alone. They often shared common destinies. On the other hand, the industrial aristocracy merely paid the labourers a wage, without sharing any other common interests with them, or taking any interest in the well-being of the labourers. There were no established customs, usages and duties connecting the industrialist to his labourers. In contrast, the master in the old system of landed

⁵⁵ TH Marshall *The right to welfare and other essays* (1981) 29.

⁵⁶ Marshall (n 55 above) 30.

⁵⁷ Rimlinger (n 17 above) 53.

aristocracy supported and assisted his serfs, while the serfs reciprocated by binding themselves to offer protection and perform services to their master.⁵⁸

The structural changes that set in with industrialisation were an important cause of the social insecurity experienced by labourers. Production shifted from self-sufficient households to the factory floor and its concomitant wage labour. Previously, the (extended) family was a production unit with its own internal distribution arrangements and social care measures. The modern nuclear family, on the other hand, is a highly mobile, urbanised structure, dependent on wage earnings and unable to achieve social self-care to the same extent as its extended predecessor.⁵⁹

The socially exposed and unsafe conditions that people increasingly began to experience during the nineteenth century, gave rise to increasing support to socialist movements bent on overthrowing the statist order. The workers' movement was well represented in the 1848 revolution in Europe. At the turn of the nineteenth century and the early twentieth century, revolutionary syndicalism with its programme aimed at an ultimate general strike bent on establishing workers' governments, developed into formidable challengers of the existing statist order in Europe and South America.⁶⁰ The reigning order was threatened and urgent defensive measures were required to uphold it. First to react to this threat was the German government, to be followed shortly afterwards by the British government, which enacted social-security legislation. The main driving forces behind the social programmes were the reigning politicians who, with the support of senior civil servants, steered the social programmes with the intention of making headway against the threat posed by the socialist revolutionary movement that placed the existing order under pressure.⁶¹

The fundamental reason behind the protection of the workers by means of social-security programmes in Germany, England and France, was the need for social integration aimed at safeguarding the state and the existing economic order against revolutionary overthrow.⁶²

In France, an effort to outmanoeuvre the church provided an additional reason for the state's assuming the responsibility as provider of social security. If the state failed to provide social

⁵⁸ W Ebenstein *Great political thinkers: Plato to present* (1969) 539.

⁵⁹ Rimlinger (n 17 above) 53-54.

⁶⁰ See in general M van der Linden & W Thorpe W (eds) *Revolutionary Syndicalism: an International Perspective* 1990.

⁶¹ Van der Linden & Thorpe (n 60 above) 58.

⁶² Van der Linden & Thorpe (n 60 above) 63.

services, it would have run the risk of allowing the church to perform that task, thereby causing the state's position to deteriorate in favour of the church.⁶³

Whereas socio-economic rights create an impression of the individual as beneficiary, the matter also has another vastly different dimension, namely that the public establishment and promotion of social-security programmes formed part of the strategy employed for defending the existing statist order and for outmanoeuvring its leftist revolutionary challengers. Therefore, the reigning statist order was just as much a beneficiary of social security and of socio-economic rights, as the individuals who derived benefit from it. By accepting new social duties, the state not only became a totalitarian benefactor, but at the same time outwitted its revolutionary challengers. Second-generation rights were the trump card.

In commenting on this, Hannah Arendt points out that, notwithstanding the successes scored by the trade union movement in its capacity as a pleader for improved social care and security, it failed as a revolutionary political movement.⁶⁴ The legal instrument of second-generation rights would ultimately persuade the union movement to settle on the basis of state-provided social care, instead of trying to achieve the strategic political goal of overthrowing the statist order. After achieving satisfaction of the social needs of the workers and paving the way towards the attainment of a bourgeoisie lifestyle, the revolutionary socialist ideal was removed from the political agenda. The state and socio-economic rights were instrumental in achieving just that. In this way human rights once again served the statist order.

3.2 Horizontalism and the ideological turnabout of human rights

The original aim of instruments endeavouring to protect fundamental rights was to define the sphere upon which government might encroach, in order to protect the domain of individual freedom. Basic rights thus tried to keep government conduct under control by subjecting it to fundamental rules applied as criteria of validity for government conduct. These criteria of validity give expression to basic assumptions of constitutionalism, because they try to steer government conduct in terms of basic standards, thereby finally ensuring that it will always be compliant with minimum standards.

⁶³ Van der Linden & Thorpe (n 60 above) 58.

⁶⁴ H. Arendt *The Human Condition* (1958) 216. See further in this regard the commentary of DM Davis 'Human rights — A re-examination' (1980) 97 *SALJ* 94-102 on the manner in which human rights outmanoeuvred revolutionary politics.

The protection of fundamental individual rights thus tried to replace unfettered statist absolutism with regular conduct that complied with basic legal requirements of both a procedural and a substantive nature.

Human rights instruments were initially aimed at the protection of individual freedom. It was undertaken by means of measures designed to guard against the outrage of government encroachment on, as well as to regulate the domain of individual freedom. Statist absolutism and totalitarianism were therefore the classic antagonists of human rights.

Meanwhile the situation had changed completely. Second-generation rights burdened the state with a plethora of duties in respect of the welfare of individuals. Consequently, the state became involved in the finer details of the entire daily welfare of individuals, by reason of its obligation to satisfy individual needs in compliance with human rights. Human rights became an instrument for the inescapable establishment of statist totalitarianism. In fact, whereas early totalitarianism was a phenomenon associated with specific ideologies, nowadays this does not hold true. Statist totalitarianism has now become a general trait of almost the entire political reality.⁶⁵ A new dimension, which has brought about additional interference of the state in the domain of individual freedom, was added in the form of the horizontal application of human rights.⁶⁶ Horizontal application *inter alia* causes human rights to regulate mutual relationships among private persons, including individuals, in addition to fulfilling their classic function, namely the regulation of the relationship between government and subject. This implies that individuals (as well as private legal persons) are bound by human rights provisions. It means that individuals are not only holders of rights, but have also become obligated parties in terms of human-rights provisions.

The state is, of course, not the only institution occupying a powerful position in relationship with individuals. As a result of the enormous accumulation of capital, private institutions (particularly in the commercial world) are as powerful, or even more powerful, than the state. In consequence they are in a similar position than the state where they may render themselves guilty of an abuse of power that detrimentally affects individuals. For this very reason the argument is sometimes raised that human rights instruments need to regulate

⁶⁵ Diamond (n 49 above) 124.

⁶⁶ On the horizontal application of human rights, see in general IM Rautenbach *Algemene bepalings van die Suid-Afrikaanse handves van regte* (1994) 75-87; DM Davis *Fundamental Rights in the Constitution* (1997) 31; P van Dyk & GJH van Hoof *Theory and practice of the European Convention on Human Rights* (1990) 15.

private relationships as well.⁶⁷ It is, however, not at all necessary to regulate the potential abuses that could result from unequal relationships in the private domain by employing *general* constitutional provisions. In fact, individual statutory measures aimed at resolving specific problems would appear to be a more apt and effective method of dealing with this type of problem.

Furthermore, the enormous risks inherent in the general horizontal application of constitutional rights must be thoroughly considered.⁶⁸ Horizontal application causes the state to encroach on the private and civil domain, in which the integrity of individual choices and civil activities should be protected. This results in the destruction of individual freedom and civil interaction. When the right to equality and against unfair discrimination is applied horizontally, it can bring about a situation where individuals' freedom of choice to exercise even the most private and intimate of choices in respect of their association with other individuals are rendered nugatory. It might perhaps be argued that individuals are indeed entitled to the right to freedom of association and that the undesirable scenario just mentioned will therefore never arise. However, such an argument need not necessarily be valid. The crux of the matter is that individuals could, in the exercise of their choices, become embroiled in a legal dispute during which they would have to explain that the choice concerned is indeed protected by the right to freedom of association. This, in turn, causes freedom of association to be subjected to strict state control due to the horizontal operation of the right to equality. Instead of being a fundamental right, individual freedom is in this way relegated to a mere exception in so far as it may please the state.

In South African case law sensitivity for this totalitarian risk came to the fore⁶⁹ when Judge Ackermann pointed out that the horizontal application of the right to equality could actually have the above-mentioned undesired implications⁷⁰ resulting in the Bill of Rights also becoming a code of duties⁷¹ In the same judgment Judge Kriegler erred by not displaying similar insight and unsuspectingly rejecting as a mere bogeyman the notion of totalitarian risks inherent in the horizontal application.⁷²

⁶⁷ Davis (n 66 above) 31. This in particular has caused the loss of the revolutionary appeal of syndicalism and its gradual demise as a political force after 1920. See Van der Linden & Thorpe (n 60 above) 18-19.

⁶⁸ See for example AJ Jeffery 'The dangers of direct horizontal application: a cautionary comment on the 1996 Bill of Rights' (1996) 1 *The Human Rights Constitutional Law Journal of South Africa* 10-16.

⁶⁹ *Du Plessis and Others v De Klerk and Another* 1996 5 BCLR 658 (CC) para 100-112.

⁷⁰ *Du Plessis v De Klerk* (n 69 above) para 108.

⁷¹ *Du Plessis v De Klerk* (n 69 above) para 112.

⁷² *Du Plessis v De Klerk* (n 69 above) para 120, 122.

The present South African Constitution makes provision for qualified horizontal application.⁷³ There are, however, certain provisions, including those pertaining to the right to equality and the right against unfair discrimination, in respect of which horizontal application obtains without any qualification at all.⁷⁴

The Constitutional Court could find nothing untoward in this regard and without further comments the provisions concerned were found to be in order.⁷⁵ Thus the way has been paved for fears harboured by Judge Ackermann to become true.

By specifically providing for the unqualified horizontal application of the right to equality, the initial premise and aim of human rights were abandoned, replaced and redirected. Whereas the original goal of these rights was the legal entrenchment of individual freedom and whereas human rights were the initial guardians of the domain of individual freedom, the exact opposite now obtains. By means of horizontal application, human rights are now providing the intruding state with constitutional weaponry against the values of freedom; these rights are now posing a threat to the domains of freedom and social and civil activity.

3.3 The disharmony and suspicion of human rights

The human rights discourse is quite often undertaken in a spirit of jubilation and in an atmosphere of excited joyfulness. With the introduction of a bill of rights in South Africa in 1994, the human rights regime was welcomed by a great number of people with almost infantile exuberance. Human rights as the expected antidote for almost all social and political ailments, as prescribed by the Constitution and applied by the courts, provided many with a source of peace of mind, elation and joy.

However, the *raison d'être* of human rights, irrespective of how valid it may be, certainly does not justify such joy in the least. If real communal ties existed within the state, founded upon mutual individual trust, respect and cooperation, there would have been no reason to develop a system of human rights in terms of which human relationships had to be regulated from above.

⁷³ Section 8(2) and (3) of the Constitution, 1996.

⁷⁴ Section 9(4) obliges private individuals not to discriminate unfairly against other individuals. In terms of section 9(5) discrimination is unfair unless the defendant can prove the opposite on a balance of probabilities.

⁷⁵ *In re Certification of the Constitution of the Republic of South Africa 1996* 1996 10 BCLR 1253 (CC) para 53-56.

A system of human rights recognises and confirms the reality of the community-deprived atomistic tradition introduced by Hobbes. In terms of this tradition the state is not the political manifestation of an authentic community of people, but merely an institution that endeavours to suppress and manage the potential and real conflicts of antagonistic persons, by means of a system of demarcated individual rights. Human rights are therefore one of the outcomes of the Hobbesian tradition. Both Karl Marx and Friedrich Engels saw this for what it was and provided some fitting comments. Marx observed as follows on the premises of rights:

None of these so-called rights of man goes beyond the egoist man, beyond man as a member of civil society, as man separated from life in the community and withdrawn into himself, into his private interest and his private arbitrary will. These rights are far from conceiving man as a species-being. They see rather the life of the species itself, society, as a frame external to individuals, as a limitation of their original independence.⁷⁶

To Friedrich Engels the state, with its antagonistic individuals and their conflicting goals, is typical of a serious social pathology. According to him, the state:

is the confession that this society has become hopelessly divided against itself, has entangled itself in irreconcilable contradictions which it is powerless to banish. In order that these contradictions, these classes with conflicting interests, may not annihilate themselves and society in a useless struggle, a power becomes necessary, that stands apparently above society and has the function of keeping down the conflicts and maintaining order. And this power, the outgrowth of society, but assuming power over it and becoming more and more divorced from it, is the state.⁷⁷

It is unnecessary of course, to emphasise economic conflict in particular, as was done by Engels. Nowadays mutual economic conflict and antagonism are certainly still remaining important factors, but recently conflicts caused by conflicting group identities in particular those of a linguistic and cultural nature, have forcefully entered the stage. Conflict has arisen in the form of the clamour for new rights, in addition to the existing individual rights. Furthermore, the recognition of even more rights actually reveals the existence of further antagonism in the state — new antagonisms regulated by new rights. Although such rights are partly successful in combating and managing conflict, the recognition of an ever growing number of new rights simultaneously delivers sombre social commentary on the

⁷⁶ Karl Marx *On the Jewish Question*, quoted by R Dagger (n 1 above) 302-303.

⁷⁷ F Engels *The origin of the family, private property and the state* (translated by Ernst Untermann) (1902) 206.

societies in which human-rights regimes function. Robert Goldwin comments on this by referring to the rights culture in existence since John Locke:

In extolling the importance of individual rights, we must realize that they stem from a political teaching based on strife and harsh competition, with pain, suffering and deprivation and misery often resulting. A nation whose political scheme is based on the primacy of individual rights is one of confusion, turmoil and ferment – and unavoidably more than a little injustice. It is not a design for calm and harmony in national life. It is a design for a stormy, tumultuous and chaotic peace, but one we can nevertheless readily consent to.⁷⁸

Human rights may therefore earn praise, but then only as a tool for attempting to regulate conflict and antagonism. The society which it was designed to benefit, however, is one that is characterised by a lamentable lack of real harmonious human community and mutual trust.⁷⁹

It must also be borne in mind that bills of rights are usually contained in inflexible constitutions, entrenched against facile amendments by legislators. They therefore usually enjoy the higher status of fundamental and entrenched law. This arrangement furnishes further proof of the mutual distrust upon which constitutionally entrenched human rights are founded. Individuals and groups in the state regard one another with profound suspicion. Each and everyone is convinced that the other cannot be trusted with state authority. Therefore, a fixed and immutable mutual arrangement has to be entered into in advance to ensure that whoever is to assume power will have the minimum political manoeuvrability. Sanford Levinson formulates this truism as follows:

The very existence of written constitutions with substantive limitations of future conduct is evidence of skepticism, if not outright pessimism, about the moral caliber of future citizens; else why not simply enjoin them to 'be good' or 'do what you think best'.⁸⁰

From this it is quite clear that constitutionally entrenched human rights are not the embodiment of mutual trust, but merely the provisions of a social contract, constructed on a basis of mutual distrust and fear.

⁷⁸ RA Goldwin 'What is a Bill of Rights and what is it good for?' in A Licht & B de Villiers (eds) *South Africa's crisis of constitutional democracy: can the U.S. constitution help?* (1994) 162-163.

⁷⁹ See further Diamond (n 49 above) 140.

⁸⁰ S Levinson 'Law as Literature' (1981-2) 60 *Texas Law Review* 376.

3.4 The statist order and the prominence of the jurist class

Along with the growth of rights since the seventeenth century up until their establishment as a key mechanism of present statist society, legal experts – the legal profession with all its branches – have also entered the stage as the *class* of persons best equipped to take care of the administration of the statist order and to strengthen popular belief in human rights. The legal profession has a very long history, but the rights-inspired modern state – the legal regime – has produced the sociopolitical infrastructure that is the domain of activity of the legal profession par excellence.

The *Repubblica Christiana* of yore was religiously inspired and the class most suited to that order was the clergy who dominated society.⁸¹ However, the present statist society is more pluralistic than its religious predecessor but, just like the *Repubblica Christiana*, it has produced its own – if not dominant, at least extremely influential – class, namely the jurist class, which can make the most of things by applying the rhetorical instruments of the law with skills equalling those of the early clergy, who employed the rhetorical skills of theology. Just as the *Repubblica Christiana* was a theologised order, present statist society is a juristic and juridified order.

In die Middle Ages the only issues worthy of attention were of a religious nature. This at least seemed to be the case, for although a problem might not even have appeared to be religious from a nonmedieval perspective, it would be formulated in theological terms to fit into the theological discourse. This had the effect of elevating the clergy to a position from where they could monopolise the authority of expressing any opinions on such theologised issues. All others, the nontheologians, who did not master the theological discourse, were excluded from it. That is the reason why the handling, control and resolving of issues were monopolised by the theologian class. Manipulation of the discourse in such a way that redefines all problems in theological terms, thus ‘theologising’ them, was essentially a *political* strategy, because the effect of such redefinition was to reinforce the authority of the clergy and to deprive all those who were not members of the clergy of any significant authority and influence.

A similar phenomenon reared its head in the statist order with its rights-inspired society. Many problems, including the most important public issues, are also being defined and redefined and classified, but this time not to appear as theological issues, but as issues of a legal nature, in order to fall within the operational domain and under the

⁸¹ See chapter 2.1.

control of jurists. The process of juridification has in fact made much headway. Theo van Boven, a former UN human rights functionary, comments in this respect:

The great international issues of our times can all be framed, argued and contested on the terrain of human rights — issues of war and peace, self-determination, colonialism, racism, apartheid, the preservation and conservation of the environment, development, population, food, poverty, the establishment of a new international economic order, a new social order and a new human order.⁸²

The strategy being implemented here, is one of *disassociate definition*.⁸³ In terms of this it is possible that an issue could be of a political nature, but through the process of disassociative definition it will be disassociated and detached from politics and redefined as a legal issue. Hence the problem will be *rhetorically* depoliticised and shifted to the professional sphere of the jurist as a redefined *legal* issue. Thereby, the political discourse will be placed squarely within the sphere of control and authority of the legal profession. All non-jurists will be excluded from the discourse and made dependent on the jurist who controls the professional sphere in question.

Conspicuously, the prototypical legal-rhetorical strategy was pursued at the exact time when the statist era commenced. It happened in 1610 when Sir Edward Coke, in *Bonham's Case*, much to the alarm of King James I, assumed powers of review and annulment in respect of acts of both Parliament and the king on behalf of the court.⁸⁴ Coke delivered a judgment in his capacity as Chief Justice of the Common Pleas in *Bonham's Case*, but he was later elevated to the office of Chief Justice of the King's Bench where he wielded far less influence.⁸⁵ Although he was subsequently dismissed as a judge, he would ultimately as a member of parliament play a leading role in the opposition of the absolutist tendencies of James I.

Coke assumed powers of review and annulment in respect of Parliamentary acts and decisions of the king on the basis of rather tenuous authority,⁸⁶ when he declared in his judgment:

⁸² T van Boven *People Matter: Views on international human rights policy (compiled by Hans Toolen)* (1982) 16.

⁸³ P Goodrich 'Rhetoric as jurisprudence: An introduction to the politics of legal language' (1984) 4 *Oxford Journal of Legal Studies* 92-93.

⁸⁴ On this and on Coke's influence, see *inter alia* FT Plucknett 'Bonham's case and judicial review' (1926-1927) 40 *Harvard Law Review* 30-70; (a) ES Corwin 'The establishment of judicial review' (1910) 9 *Michigan Law Review* 102-125; (b) ES Corwin 'The "higher law" background of American Constitutional Law' 1928-1929 42 *Harvard Law Review* 365-409; RA MacKay 'Coke, Parliamentary sovereignty and the supremacy of the law' (1924) 22 *Michigan Law Review* 215-247; CF Mullet 'Coke and the American revolution' (1932) 12 *Economica* 457-471

⁸⁵ Mullet (n 84 above) 459.

⁸⁶ Mullet (n 84 above) 460-461; 467; Plucknett (n 84 above) 40.

It appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes will adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an act to be void.⁸⁷

Coke argued as follows: the common law is a fundamental law. The courts of law are the exclusive overseers and confidants of the common law and thus entitled to declare legislation that deviates from it null and void.⁸⁸ It was furthermore impossible to reveal the common law without a profound schooling in the common law sources and its unique *artificial reason*. Learned jurists, proficient in this common law *reason* – people of Coke’s calibre – were able to reveal the precepts of the common law. Others who were not versed in the law, including politicians and even King James I, no matter how intellectually endowed they might have been, did not possess the artificial reason of the common law. The message conveyed to the latter group was to rather refrain from expressing opinions on the law and to entrust legal decisions to those with greater proficiency in the law. Coke reported on this aspect in the following terms:

Then the king said that he thought the law was founded upon reason, and that he and others had reason, as well as the judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it ... with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said: to which I said, that Bractonsaith, *Quod rex non debetesse sub homine, sed sub Deo et lege*.⁸⁹

Coke’s dictum in *Bonham’s Case* eventually became the most important statement in respect of the establishment of modern constitutional law and, more particularly, in respect of the courts’ powers of review and annulment of executive and legislative acts in the USA.⁹⁰ On the express authority of this dictum, the practice of judicial control had been established in prerevolutionary America, long before the case of *Marbury v Madison* was decided.⁹¹ One of the

⁸⁷ Quoted by GH Sabine *A History of Political Theory* (1971) 452 from Coke’s Reports Pt. VIII, 118a.

⁸⁸ Plucknett (n 84 above) 50.

⁸⁹ Quoted by Sabine (n 87 above) 452 from Coke’s Reports Pt. XII, 65.

⁹⁰ Corwin (n 84b above) 367; Corwin (n 84a above) 105-106.

⁹¹ Plucknett (n 84 above) 62.

Founding Fathers, Alexander Hamilton, harnessed Coke in support of the establishment of judicial control.⁹²

In his method of argumentation Coke was mainly regarded as a medievalist. He went about in a fragmentary fashion, without trying to develop a comprehensive philosophical system. In addition, there are strong indications that he still adhered to the medieval notion of an immutable fundamental law.⁹³ Coke was, however, much more than a mere common law jurist. In reality, he was also a political philosopher⁹⁴ and politician.⁹⁵ In fact, he was a jurist-politician who dextrously applied the authoritative legal discourse, to which his opponent, King James I, had no answer, in order to reach a political goal, namely to restrict the legitimate spheres of the king's authority (and, by implication, of Parliament as well) and to expand the judiciary's domain of authority and, along with that, also his own sphere of influence. That was manifestly a political exercise par excellence.

The phenomenon of judicial control by a competent court — especially constitutional courts — has since become a general phenomenon, especially in the Western World.⁹⁶ This has been accompanied by a growing tendency of defining political concepts in legal terminology. Matters that would earlier have been regarded as political issues and are in fact of a political nature, are constantly being redefined in legal terms. Thus, the functional sphere of the jurist is continuously expanding and the ability of nonjurists to participate meaningfully in political activity is gradually restricted. By participating in the political discourse that has been redefined in legal terms, the political position and influence of the jurist has been reinforced and that of the nonjurist weakened. The perennial difficulty confronting the nonjurist in this context, is that he will consequently have to cope with parlance in which he is not properly versed. He will indeed never be on top of this. He will constantly risk being corrected by a jurist, who is naturally well versed in legal discourse. The normal way in which the nonjurist can escape this dilemma is by employing the professional assistance of a lawyer to speak on his behalf. In other words: avoid the problem of legal ignorance and become a lawyer's client. In this regard a further effect of this process becomes apparent, namely that the more questions are

⁹² Corwin (n 84a above) 107; Mullet (n 84 above) 458; Corwin (n 84b above) 397.

⁹³ Corwin (n 84b above) 366; Mullet (n 84 above) 466. On immutable medieval fundamental law, see chapter 2.2.

⁹⁴ Plucknett (n 84 above) 30; 45.

⁹⁵ CF Mullet (n 84 above) 461.

⁹⁶ See for example A Stone 'The birth and development of abstract review: constitutional courts and policy making in Western Europe' (1991) 81 *Policy Studies Journal* 81-95; G Dietze 'America and Europe — decline and emergence of judicial review' (1959) 76 *SALJ* 398-434.

elevated to the status of legal issues, the greater the potential client basis of jurists will become.⁹⁷ Redefinition therefore not only expands the authority and influence of the jurist; it also expands his market. In addition to the political implications of such redefinition, it is therefore also a commercially advantageous exercise.

The most obvious juridifying effect of judicial review is that the courts, and therefore the judiciary, are being elevated to the status of (joint) national policymakers.⁹⁸ Juridification has, however, progressed beyond court judgments. It has also changed the way in which politicians and policymakers conduct themselves. Judgments of the Constitutional Court (or other courts with the required jurisdiction) have a directive effect, for they define the boundaries for future policy options. In addition, the risk of judicial censure remains in so far as policy decisions of legislators and the executive may be legally unsound.⁹⁹ This naturally causes policy decisions to be worn down by legal arguments and considerations. Accordingly, it is not only in the courts that constitutional arguments will be referred to in judgments and by way of direct judicial intervention, but it will also continually raise its head in legislative processes.¹⁰⁰ Likewise, it is expanding into the sphere of public discourse, including the media, where arguments are continually raised about the constitutionality, or otherwise, of a variety of affairs and decisions. This phenomenon has become commonplace in South Africa. Juridified politics have become part and parcel of our daily existence. However, irrespective of how many arguments on these issues may be raised by laymen, the fact remains that jurists will always provide the final answers in a juridified discourse.¹⁰¹ Such inequality of the juridified public discourse – just like the similar inequality of the theologised discourse of the *Repubblica Christiana* – is incompatible with civic equality, which really is one of the indispensable conditions of a genuine democratic discourse.

⁹⁷ Z Bankowski & G Mungham *Images of Law* (1976) 43.

⁹⁸ Stone (n 96 above) 88.

⁹⁹ Stone (n 96 above) 87-88.

¹⁰⁰ Stone (n 96 above) 89.

¹⁰¹ The effect of the existing law and of political interference should, however, not be overestimated. Although courts can effect corrections to policy, they are naturally unable to upset a comprehensive political programme of the political branches of state authority – the legislature and the executive – especially when such a programme enjoys strong public support. Furthermore the courts are also inherently weaker in a political sense than the other spheres of state authority and one should constantly keep in mind that it is indeed the duty of the legislature and the executive to execute court orders. Although juridification has become a prominent factor in modern politics, courts should still be necessarily cautious not to meddle too easily in the policies of the legislature and the executive. On this, see *inter alia* the illuminating article of R Dahl 'Decision-making in a democracy: "The Supreme Court as a national policy-maker"' (1957) *Journal of Public Law* 293, as well as K Malan 'The Unity of Powers and the Dependence of the Judiciary' 2005 *De Jure* 2005 99-115.

3.5 Human rights, the source of an ideology of dependence

It is an inherent trait of the notion of *law* that it is clothed with authority and universally regarded with deference and respect. In fact, the law usually encapsulates an element of sanctity. For that very reason the wielders of political power always strive to formulate political power in the guise of the law by means of seemingly neutral legislation, in order to conceal the brutality that is often incidental to the obtainment and retention of political power. In this way the exercise of power is clothed with legitimacy and is, at least to a certain extent, unassailable. Law (usually) prompts obedient behaviour and when political power dons the mantle of the law, it becomes stable and much more difficult to challenge.¹⁰² Those standing to benefit most from it specifically, include those who are involved in the legal administration — the legal profession. In addition, jurists are accorded a greater or lesser measure of authority and respect. This flows, among others, from the fact that they have been clothed with the authority usually incidental to the administration of justice. At the same time, members of the legal profession are also often regarded as the only protectors against the deprivation of liberty and anarchy.¹⁰³ One simply has to consider all the freedoms (liberties) which are protected by recognised fundamental rights to realise that it is no strange phenomenon that jurists are often regarded as the *priests* who protect freedom.¹⁰⁴

The influence of the legal profession has also gradually been expanding as a result of the growing tendency to present a broader definition of legal knowledge and legal services and the concomitant expansion of legal professionals' spheres of activity.¹⁰⁵ The functional sphere of the legal profession and legal services has in fact expanded to such an extent that in reality it has become undefinable.¹⁰⁶ In addition, the defining function is usually left to the jurists themselves.¹⁰⁷ The exercise of the resultant defining action that results from this, is mainly commercially driven. The sphere is defined with an increasing scope in order to expand the domain of legal services and to acquire new markets for the rendering of legal services.¹⁰⁸

¹⁰² See in general AT Turk 'Law as a weapon in social conflict' (1976) 23 *Social Problems* 276-291.

¹⁰³ J Caplan 'Lawyers and litigants' in I Illich *et al Disabling Professions* (1977) 94.

¹⁰⁴ Bankowski & Mungham (n 97 above) 94.

¹⁰⁵ Bankowski & Mungham (n 97 above) 43.

¹⁰⁶ Caplan (n 103 above) 96.

¹⁰⁷ Caplan (n 103 above) 96; Bankowski & Mungham (n 97 above) 39.

¹⁰⁸ RL Abel 'The Rise of Professionalism' (1979) 9 *British Journal of Law and Society* 82.

Ultimately, the lawyer seems to be an almost omnipresent person – someone whose assistance is required in a large number of everyday decisions, transactions and actions. One of the effects of this has already been quite fittingly termed: the *ideology* of the aid giver.¹⁰⁹ This brought about a weakening in the position of the nonjurist in need of aid as opposed to the strengthening of the aid giver (lawyer). The ability of the person in need of aid to become and remain autonomous, progressively deteriorates and in the process a pattern of respect for and dependency on the lawyer is acquired. Legal services assume the nature of social work¹¹⁰ and the legal practitioner accordingly assumes a position akin to that of the social worker. This applies particularly in the case of state legal aid and, of course, to various new benefits that devolve upon those in need of aid, in terms of socio-economic rights. By employing all the human rights (progressively growing in numbers) exercised by individuals and with the various legal services that have been established to everybody's benefit, the law and the legal profession contribute to the creation of an all-caring state¹¹¹ – the caring Leviathan.

The influence of the legal profession derives support from a rhetorical strategy (albeit unintentional) that operates among the legal profession and all its potential clients. The use of complex and not easily comprehensible legal jargon renders the law inaccessible to the nonlawyer. Incidental thereto are complex procedures – rituals – that make the law even more inaccessible and further exacerbates the nonlawyer's dependence on and need for care of the law and the lawyer.¹¹² The arena of the court further contributes to the lay litigant's embarrassment and dependence. It undermines his confidence because he is usually uncertain as to what he is expected to do in court. Court procedures and the court atmosphere are also not conducive to the possibility of a lay litigant personally conducting his case. The complex pretrial procedures make the lay litigant even more dependent on the expert services of the professional lawyer. One could add the fact that judges normally find it difficult to communicate with lay litigants while their interaction with legal representatives is obviously much easier, seeing that they use the same legal jargon which they have no difficulty to employ. The system has therefore been designed in such a way that it is not really possible to function without legal representation.¹¹³

¹⁰⁹ Bankowski & Mungham (n 97 above) 75.

¹¹⁰ Bankowski & Mungham (n 97 above) 75.

¹¹¹ The phrase benign totalitarianism is employed by Ilich *Disabling Professions* (1977) 14.

¹¹² Caplan (n 103 above) 93.

¹¹³ Caplan (n 103 above) 101-102.

When languages differing from those of the parties are used in legal proceedings, the dependency of lay litigants on their legal representatives is further entrenched. In South Africa, for example, a strong trend has emerged to employ English as the only official language of record.¹¹⁴ Accordingly, all official court documentation will be made available in English only, thereby contributing even more to the inaccessibility of the courts to the layman, as mentioned earlier, and further emphasising the necessity of legal aid.

In addition, it obviously enhances legal inequality, as those with a full comprehension of the language of record will enjoy an advantage over those who do not have such comprehension, thus making the latter even more dependent on legal representation.¹¹⁵

Ultimately, the layman will only be able to observe the functioning of the law from a distance, as a spectator, despite the fact that his interests may be intimately entwined in the proceedings. The nonlawyer must observe all of this with a feeling of deference and respect for the law, the legal process and the judiciary. Apart from the inaccessibility and inviolability of the legal administration, due to the complexities of legal parlance, obscure procedures and the strange court atmosphere, there is also the deference that is due to the judicial officer — which in itself largely contributes to the awe in which the law is held, as explained earlier. Specific legal rules round off the court's mystique by means of the crime of contempt of court. In terms of the applicable rules, contempt of judicial officers (and the legal process) is punished, while deference and respect are simultaneously imposed. It contributes to the ennoblement of the legal process and the elevation of the presiding judge to a *legal king*.¹¹⁶

Human rights have progressively provided individuals with more rights, and they are still doing so. The greater the number of rights people hold, all the more will they become dependent on the services of the legal fraternity. The state employs the law to satisfy all the different human needs. At the same time the law serves as the key

¹¹⁴ See for example S Netshitomboni 'The use of languages in courts: the point of view of the Department of Justice and Constitutional Development' (21 March 2000) *FAK Conference: Taal in die howe* (unpublished); *Mthethwa v De Bruin NO and Another* 1998 3 BCLR 336 (N); *S v Matomela* 1998 1 BCLR 339 (CK); *S v Damoyi* 2004 2 SA 564 (K). Cf also K Malan 'Observations on the official use of language for the recording of court proceedings' (2008) 23 *SAPR/L* 59-76.

¹¹⁵ K Malan 'Oor die hofnotuleringstaal in die lig van die grondwet en na aanleiding van onlangse regspraak' (1998) 61 *THRHR* 700-702.

¹¹⁶ In the English world, judges are so highly respected that outsiders — from outside the English world — sometimes refer to them as kings of law (which, incidentally, fits in well with Dworkin's use of the concept Law's Empire.) See JMT Labuschagne 'Minagting van die hof: 'n strafregtelike en menseregtelike evaluasie' (1988) *TSAR* 330.

strategy for entrenching the statist order. Who, after all, will really consider turning his back on a benefactor state? Individuals are the needy receivers of the benefits supplied by the state via the law. The addition of every new right reveals yet another dimension in human need and dependency, as well as the further erosion of individual autonomy. The grip of the caring, merciful benefactor – *Leviathan*, the mortal god, on his flock – the *citizens* of the territorial state – has also gradually become more stifling. As time goes by, the state is becoming more sensitive to specific needs, for example: the needs of women, children, indigenous populations, religious, linguistic and cultural minorities – all of whom are new beneficiaries in terms of human rights. However, as all people become receivers of Leviathan's legal benefits and also become more dependent, their ability to fend for themselves by means of political action and any similar action is eroded. With steadily growing care, Leviathan is tending his helpless flock of state citizens. It has thus become well-nigh impossible to be unobservant of, and unfaithful to Leviathan. Challenging the mortal god is absolutely out of the question. The state has been harnessed against such threat by human rights.

CHAPTER 9

TWO LEGAL SCENARIOS IN TERMS OF THE STATIST PARADIGM

1 Introduction

Both municipal and international law are almost consistently applied in maintaining and defending the existing territorial statist order and imposing individual identity in conformity with the prescriptions and after the image of the state. Public law as we know it, is a thoroughbred scion of the statist paradigm and a faithful servant of the process of inculcating individuals with a statist identity. It monopolises individual identity to the advantage of the jealous mortal god, ensures that individuals ascribe to only one statist-prescribed identity and it faithfully prevents individuals from accepting any public identity other than a statist identity. In its capacity as the only collective entity enjoying the recognition and protection of public law, the state exercises a monopoly. Therefore, the only entities worthy of legal recognition are the state and individuals, whereas other entities (cultural and similar communities) are excluded from any legal protection, for the sake of the state. Vernon Van Dyke once commented as follows:

The assumption was that rights exist at two levels, the level of the individual and the level of the nation state. Groups other than the nation or the population of the state could be ignored.¹

Accordingly, citizenship is a statist notion. One's citizenship is the official imprint of a statist identity, whilst association with any other community – irrespective of how important it may be to an individual – will forego such protection. In addition, there is a plethora of other legal rules and legal constructs that support the statist order. Discussing all of these will be an impossible task. We shall therefore merely focus on two striking examples in this chapter: the first, from

¹ V Van Dyke 'Human Rights and the Rights of Groups' (1974) 18 *American Journal of Political Science* 726. See further J Pestieau 'Minority Rights: "Caught between individual rights and peoples' rights"' (1991) VI *Canadian Journal of Law and Jurisprudence* 369-370.

a municipal law perspective – the law pertaining to the crime of high treason; and the second, from an international law perspective – the legal position with regard to self-determination, secession and the preservation of existing international frontiers.

These two topics nominate themselves, as it were, as the most striking and illustrative examples, because they relate to legal mechanisms that not only protect a specific state, but the statist order per se. High treason has a long European and English history and the legal rules that regulate it are still enforced in many states to this day. The rules dealing with secession, being part of international law, are by their very nature also internationally applicable. Likewise, these rules are not restricted to a single state, but are applicable in the entire statist order.

In addition, the law pertaining to high treason and secession demands our attention, because it entails outstanding examples of the pursuit of legal scholarship in terms of the statist paradigm and is preeminently aimed at promoting a statist identity and the corresponding suppression of all non-statist identities. The legal rules that regulate high treason and secession function as items of the statist paradigm and as strategies of state building.

2 The inviolability of the state: High treason

High treason is any unlawful act, committed either inside or outside the frontiers of the country concerned, by a person who owes allegiance to such state, with the intention of achieving any of the following goals: violating or endangering the existence, independence or safety of the state; changing the constitutional structure of the state; or overthrowing or coercing the government.² The unique characteristics of high treason are that it is committed against the state and that it can only be committed by someone who owes the state allegiance.

One of the fundamental functions of the law is that it provides oppressive mechanisms to enable a specific political order and economic dispensation to survive. At the same time, legal rules, including oppressive legal rules, are the products of a reigning political philosophy³ and of an existing political prepotence of power. The law pertaining to high treason is a typical example of this. It has developed and adapted to comply with the changing nature and needs of the state. In fact, more than anything else, the development of the

² This is basically the definition of CR Snyman *Strafreg* (2006) 315 and J Burchell *et al Principle of Criminal Law* (2005) 923.

³ BL Ingraham *Political Crime in Europe* (1979) 317.

law of high treason casts light on the development of the notion of the state.⁴

The allegiance element of high treason is of Germanic origin.⁵ A person owed allegiance to the community and the army to which he belonged. The crime was committed when such allegiance was breached.⁶ The crime thus pertained to real loyalties and the breach of close relations of an almost personal nature. In addition, it is said that the Germanic origins of high treason can be traced to the idea of personal loyalty to the leader, who was harmed by the breach of trust. The leader, in his turn, was duty-bound to protect his community, which duty found expression *inter alia* in the princely coronation oath.

High treason, however, also has Roman roots. The Roman element finds its origin in the breach of *maiestas* (broadly speaking, sovereignty) and the injustice caused to the person – the king – endowed with *maiestas*.⁷

In Europe, Roman conceptions of high treason eventually gathered a larger following than Germanic conceptions. The rise of dynastic states⁸ (rudimentary states structured around royal families) was a fertile breeding-ground for the further growth of the Roman conceptions, because it would support the position of the sovereigns in the emerging dynastic states. Nevertheless, the Germanic notion has partially survived and still lives on in the breach-of-allegiance element of high treason.

In the late medieval period, when the dynastic states were emerging in England and Europe, high treason was a crime that was committed particularly against the *person* of the king (and his family), and not against the state as such.⁹ This was clearly evidenced in the act of 1352 of King Edward III of England, which specifically dealt with high treason and from which it is clear that the protected legal interest in respect of high treason was not the state, but the person of the king.¹⁰ It was in fact attributed to the influence of Roman law that high treason was characterised as of a crime against the person of the ruler.¹¹

⁴ CL von Bar *A History of Continental Criminal Law* (English translation by T Bell) (1968) 281.

⁵ JMT Labuschagne 'Menslike outonomie en staatlke majestas: opmerkinge oor die dekriminalisasie van hoogverraad' (1992) 5 *Suid-Afrikaanse Tydskrif vir Strafrechtspleging* 125.

⁶ Von Bar (n 4 above) 101.

⁷ JG Bellamy *The law of treason in England in the Middle Ages* (1970) 1-4.

⁸ On this see chapter 3.5.

⁹ W Holdsworth *A History of English Law* (1937) Vol VIII 322.

¹⁰ Holdsworth (n 9 above) (1936) Vol II reproduces the act at 449 n 7.

¹¹ Holdsworth (n 9 above) (1942) Vol III.

As the concept of the state gradually gained recognition as an abstract entity detached from the sovereign, and as the king was increasingly regarded as the mere head and representative of the state, the conception of high treason as a crime essentially committed against the state itself, and not against the sovereign, gradually gained prominence.¹²

In Western Europe, where the law was meticulously developed at the universities in conformity with the *Corpus Iuris Civilis*, quite different from the situation in England where the development of the law occurred in a real and practical way,¹³ conceptions of high treason also changed. There was an increased realisation of the fact that the state and the sovereign were most definitely not a single entity, even though the king was the representative of the state,¹⁴ and that high treason was committed against the state, and not against the king.

Before 1770 it was standard practice in Europe for crimes that challenged political (state) authority and sovereignty to be defined in feudal terms. It meant that high treason still bore the imprint of the personal feudal relationship between king and subject. High treason was therefore regarded as a breach of personal loyalty to the king in his capacity as head of state, instead of a breach of trust owed to the impersonal, abstract state itself.¹⁵ By the second half of the eighteenth century such adaptation was effected in Austria and Prussia, with the result that high treason became a crime against the state and ceased to be a crime against the king. Thus, the conception of high treason as a crime against the state as a distinctive entity, gained prominence.¹⁶ The development of high treason as a crime against the state as an abstract entity, was also accounted for by Roman-Dutch scholars. Matthaeus, whose *De Criminibus* was published in 1644, already treated high treason in its modern, abstract guise. Referring to Bodin, he approached the *maiestas* concept by associating it with the state itself, and not with the sovereign.¹⁷ The same position obtained in respect of Van der Linden, who in 1806, defined high treason in the modern statist sense in a way

¹² Holdsworth (n 9 above) 322.

¹³ See for example R David & JEC Brierly *Major Legal systems in the World Today* (1985) 40-49; 338-339.

¹⁴ Von Bar (n 4 above) 281.

¹⁵ Ingraham (n 3 above) 39.

¹⁶ Ingraham (n 3 above) 48.

¹⁷ A Matthaeus *On Crimes: A commentary on Books XLVII and XLVIII of the Digest* (Edited and translated into English by ML Hewitt & BC Stoop) (1993) Vol II: 48.2.3-4 (212-213).

that corresponds fundamentally with the definition furnished at the beginning of this chapter.¹⁸

In England it was realised by the sixteenth century that Edward's legislation of two centuries before had become totally inadequate to protect the state in its amended form. At that stage the new territorial state was already firmly established and it was accepted that allegiance to the state would have to enjoy preference above all other relationships.¹⁹ Two strategies were employed to bring the law of high treason up to date, as it were, in order to make it compliant with the needs for protecting the territorial state. First, a fair amount of legislation was passed to allow a growing number of prohibited acts to fall within the scope and ambit of the definition of high treason.²⁰

Much more important, however – and typical of the English legal tradition – is the fact that the courts by way of constructive interpretation, extended the crime of high treason, in terms of Edward's existing out-dated legislation, to take on the form of the modern crime committed against the state.²¹ It was in fact in the second half of the sixteenth century, when the territorial state with its permanent abstract character was in the process of replacing its dynastic predecessor, that the strategy of constructive interpretation transformed this crime into one with a very different content.²²

The intention (purpose) of killing the king or, to refer to the *ipsissima verba* of Edward's statute, *compassing or imagining the king's death*, was thus extended by way of constructive interpretation that it ultimately not only protected the king, but also assured the survival and stability of the state.²³ In the early seventeenth century – the era of Edward Coke – the procedure of constructive interpretation was already well established.²⁴ In the second half of the seventeenth century it gained even more momentum. A growing number of acts that were aimed against the state, were interpreted as acts committed with the intention of killing the king in order to accommodate them under the antique Edwardian definition of high treason.²⁵

¹⁸ J van der Linden *Regtsgeleerd, Practicaal en Koopmanshandboek* (1806) 228; *contra* DG van der Keesel *Lectures on Books 47 and 48 of the Digest Vol II* (Latin text edited and translated into English by B Beinart & P van Warmelo) (1972) Vol II 641-647.

¹⁹ Holdsworth (n 9 above) (1937) 310.

²⁰ Holdsworth (n 9 above) (1945) (Volume IV) 496-498.

²¹ Holdsworth (n 9 above) (1937) 310-314; Ingraham (n 3 above) 51.

²² Holdsworth (n 9 above) (1937) 310.

²³ Holdsworth (n 9 above) (1937) 310.

²⁴ Holdsworth (n 9 above) (1937) 311.

²⁵ Holdsworth (n 9 above) (1937) 314.

In this process, the pattern of paying allegiance changed fundamentally. Whereas allegiance had earlier been owed to a king personally, it was now owed to the impersonal state.²⁶ Although this was a radical change, it occurred unseen as a result of the subtlety of constructive interpretation – differing considerably from the position where noticeable alterations to the text of the definition of the crime would have occurred. In spite of the fact that high treason had already been a crime against the state for a long time, it was still couched in anachronistic terms as if it were a crime against the king.²⁷ For instance, in the second half of the eighteenth century the English legal scholar, Blackstone, still described high treason in terms that concealed the aforementioned changes and misrepresented it as the out-dated feudal form of it.²⁸ Quentin Skinner calls attention to the fact that the changing nature of high treason did not escape the attention of Hobbes. Hobbes already pointed out in *De Cive* that allegiance was not owed (any more) to those exercising sovereignty – the king – but to the sovereignty inherent in the state itself.²⁹ At least since the Glorious Revolution of 1689 it was a *fait accompli* in England that high treason was a crime against the constitutional order of the state itself, and not against the king.³⁰

A significant observation gleaned from the explanation above, is that the law pertaining to high treason in its modern form saw the light at the same time as the territorial state. When the dynastic state was replaced by the territorial state, the rules regulating dynastic high treason, which protected the king, were also abrogated in order to make way for the rules in respect of statist high treason, dedicated to ensuring the survival of the abstract impersonal state.

The logic behind the law of high treason is that the subject owes allegiance to the state in exchange for the state's duty of protection towards the citizen.³¹ Although the crime suggests that its rules are anchored in a contractual relationship between government and subject and are therefore of a contractual nature, it is in fact only the citizen's duty of paying allegiance that is legally enforceable (and sanctioned by criminal law), whereas the citizen's right in terms of the state's duty is not enforceable at all.³² At present one might possibly argue that the state is obligated to satisfy the constitutional

²⁶ Q Skinner 'The State' in T Ball *et al* (eds) *Political Innovation and Conceptual Change* (1989) 124.

²⁷ O Hood Phillips & P Jenkins *Constitutional and Administrative Law* (1978) 457; CR Snyman 'Die trouvereiste by hoogverraad' (1988) 1 SA *Tydskrif vir Strafrechtspleging* 6.

²⁸ Ingraham (n 3 above) 51-52.

²⁹ Skinner (n 26 above) 124.

³⁰ Ingraham (n 3 above) 52.

³¹ GL Williams 'The correlation of allegiance and protection' (1948-50) 10 *Cambridge Law Journal* 56.

³² Williams (n 31 above) 58.

rights of individuals. Although such argument is not absolutely invalid, as explained in chapter 8, such rights unfortunately have the counterproductive effect of exacerbating the dependence of individuals on the state. The effect of this, in turn, is to weaken the position of the individual towards the state even more. Furthermore, even if a court were to enjoin the executive branch of government to perform its constitutional duties towards the citizenry by way of a court order, in the final analysis the latter would be dependent on the goodwill of the executive authority to execute such order.³³ If the executive authority were unwilling to execute such an order, there would ultimately be no legally sanctioned enforcement measure available in terms of positive law that could force the executive to perform its duties in this regard.

The content of the state's duty towards those who owe allegiance to it (usually the citizens of the state in question)³⁴ are of both a positive and a negative nature. The positive side of such duty implies in the first place, that the state must protect those owing their allegiance to it against the unlawful conduct of others, by exercising authority, applying lawful force and securing its power of persuasion.³⁵ The negative aspect of the duty entails that in the course of its action the state must show respect to those owing it their allegiance, by restraining its functionaries from acting unlawfully in any way whatsoever.³⁶ Yet another implication is that state functionaries are duty-bound to act in terms of the law of the state and that individuals can rely on the protection of the state's domestic law. Accordingly, the state will not be entitled to employ the act-of-state doctrine as a defence in order to render the law nugatory in respect of specific individual claims against it.³⁷ Nonetheless, the vulnerability of the individual's position in terms of the law of high treason was demonstrated in South Africa during the 1980's, when various black activists were prosecuted for high treason resulting from their activities against the previous white minority government.³⁸ The duty of allegiance owed by the accused arose in only one case, in which it was held that the accused in question had indeed owed the

³³ In the recent past this was graphically illustrated in South Africa by the state's glaring omission to comply with court orders. See *Nyathi v MEC for the Department of Health* 2008 9 BCLR 865 (KH).

³⁴ On the issue of who owes allegiance, see JRL Milton *South African Criminal Law and Procedure Vol II: Common Law Crimes* (1996) 28-31.

³⁵ Williams (n 31 above) 58. This duty has *inter alia* been incorporated into section 12(1)(c) of the present South African Constitution. Even in the absence of such express constitutional provision, such a duty would still have existed, because this type of duty forms the foundation upon which the state is based. On this, see K Malan 'The inalienable right to take the law into our own hand versus the faltering state' (2007) TSAR 642 *et seq.*

³⁶ Williams (n 31 above) 58.

³⁷ Williams (n 31 above) 63.

³⁸ See for example *S v Lubisi and Others* 1982 3 SA 113 (A), *S v Tsotsobe and Others* 1983 1 SA 856 (A), *S v Zwane and Others* (3) 1989 3 SA 254 (A).

state their allegiance.³⁹ In the other cases the issue of allegiance did not arise. Although the state was entitled to their allegiance, all the accused were black persons and at that stage excluded from important civil and political rights in South Africa. They were therefore unable to participate in the political process in terms of the stereotypical rules of statist democracy. Although the state had thus demanded allegiance from the accused, the position obtaining in South Africa of the time had the effect that the state had in fact been unfaithful to the accused, and also to all those who were in the same position as the accused.

It might be argued that the said high treason cases, conducted during the last phase of white minority rule in South Africa, are merely indicative of the way in which the law pertaining to high treason was applied in favour of the state under the previous South African dispensation. In other words, they cannot at all serve as an indication that the law of high treason benefits the statist order *per se* and that it would be injurious to individuals and communities. And yet, the law of high treason was not only an accidental tool of the white minority government. On the contrary, it was in fact a legal strategy in terms of which the state and statist identity derived benefits to the detriment of nonstatist formations and nonstatist identity.

During the Second Anglo-Boer War (1899-1902) many Cape and Natal Afrikaners were prosecuted for alleged high treason.⁴⁰ The series of high-treason cases launched as a result of this affords a striking example of the way in which the law of high treason was applied to drive home statist identity and punish competing nonstatist identities. Many Cape and Natal Afrikaners who lived under British rule, associated with the burghers of the republican Free State and Transvaal who spoke the same language and belonged to the same cultural community (often their own kin). They were, however, British subjects and in that capacity they owed Britain their allegiance. Consequently, they were confronted by the dilemma of a double identity and a double loyalty: on the one hand there was their real and existential identity as Afrikaners that connected them to their common cultural community in the republican north. They were separated only by arbitrarily demarcated international boundaries that were in themselves the product of imperial England's colonial activities. On the other hand, there was their abstract legally

³⁹ *S v Tsotsobe* (n 38 above).

⁴⁰ Some of these cases have been reported, like *R v Prozesky* 1900 (NLR) 216, *R v Badenhorst* 1900 (NLR) 227, *R v Adendorff* 1900 (NLR) 230, *R v Bester* 1900 (NLR) 237, *R v Marais* 1900 (NLR) 242, *R v De Jager* 1901 (NLR) 65, *R v Dohne* 1901 (NLR) 175 and *R v Venter* 1901 (NLR) 185. See also the judgments in the Cape high-treason trials (the Colesberg and Dordrecht trials).

enforced British identity, which required them to pay allegiance to Britain. Many Afrikaners in the Cape Colony and Natal felt naturally inclined to join the ranks of their own people who spoke the same language and belonged to the same ethnic group, rather than paying allegiance, in their capacity as British subjects, to a foreign power, which possessed dominions in Africa, on the sole basis of an existentially empty, but legally enforceable identity. This sentiment was reinforced by the evidently aggressive nature of British colonial policy towards the Boer Republics.⁴¹

The dilemma of the colonial Afrikaners in the Cape Colony and Natal was that active support of their republican fellow Afrikaners constituted a breach of their legally imposed allegiance to Britain, for which they would be guilty of high treason. In the Colesberg high-treason case, the assistance rendered by Afrikaners from the Cape Colony to the Boer forces was indeed described as one of the most heinous forms of high treason.⁴² On the other hand, a conscientious discharge of their duty of allegiance to Britain and their simultaneous failure to support their fellow Afrikaners amounted to moral treason. Therefore, they were forced to make a choice between treason and treason: treason against the foreign British state, or treason against their own cultural community.

The criminal-law rules pertaining to high treason have, however, been designed to entrench the legally inspired statist identity. In the present case it had the effect of legally condemning close ethnic and linguistic ties and ties forged by a common historical experience, and of forcing Afrikaners to commit treason against (or at least to disavow) their own people. The immoral effect of any prosecution for high treason in such an event speaks for itself. However, the purpose of this crime's existence, namely to enforce one's allegiance to the state, does in fact require such immoral methods.

Leviathan — the mortal god — is a jealous god who will not tolerate any competing claims. Furthermore, he will punish those bound to pay him their allegiance who stray from the true path, in the sense of switching their allegiance to some other entity.

In chapter 6 it was explained how the political ideology of nation building (state building) has elevated statist citizenship to the position of sole public identity and has opposed every other identity either actively, or at least by discouraging it.

⁴¹ On this, see *inter alia* J Marlowe Milner: *Apostle of Empire* (1976) 58-75 in which the author describes how the British High Commissioner to South Africa, Alfred Milner, with the support of the Minister of Colonies, Joseph Chamberlain, with deliberate intent imposed a war against the Boer Republics and caused the failure of all compromise possibilities that could have prevented an armed conflict.

⁴² See the Cape high treason trials (n 40 above).

The content and operation of the relationship of allegiance to the state, in terms of the definition of the crime of high treason, have the same effect. By applying the rules of criminal law, the state is elevated to the status of being the most important and sole legal entity worthy of legal protection. In the process, it will, if necessary, sacrifice all other, often much closer forms of community, founded upon the real existential commonalities of language, culture, blood relations and shared historical experience.

The legal rules pertaining to common-law crimes would always appear to be neutral, because they were established in the misty haze of the distant past. High treason is in fact such a crime. The law of high treason is apparently also of a politically neutral nature. In reality, however, the law of high treason is employed as a state-building strategy. It is the method by means of which criminal law is harnessed to benefit the statist paradigm and statist identity; it is detrimental to real (nonstatist) communities, founded upon existing real commonalities.

3 The inviolability of the state: (Territorial) statist self-determination

Both modern international law and the territorial state are aspects of statism. Both were founded in the same period – in the sixteenth and seventeenth centuries. Since then international law has been, and still is, to a large extent *interstate* law. It caters for, and reflects, the interests of the territorial state and is primarily aimed at the preservation of the territorial statist status quo. The (territorial) statist model of international law and international relations, sometimes referred to as the Westphalian model,⁴³ accepts a more or less restricted number of states as a basic point of departure and then proceeds on the basis of three fundamental premises: statist sovereignty, territorial integrity and a prohibition on interfering in the internal affairs of states.⁴⁴ These three points of departure form a logical unit and all three of them continuously function to preserve the existing territorial states. Accordingly, international law is undeniably a product of the statist paradigm.

The international, or more correctly, the interstatist system implemented after the Second World War, is a continuation of the age-old Westphalian model. (This model derives its name from the

⁴³ A Cassese *Self-determination of peoples: A legal reappraisal* (1995) 325.

⁴⁴ Cassese (n 43 above) 353. In terms of article 2(1) of the Charter of the UN, the sovereign equality of member states of the UN is one of the basic principles of the UN. The prohibition of interference in the internal affairs of a state is contained in article 2(7) of the Charter.

Peace Accord of Westphalia of 1648, which concluded the Thirty Years' War.) It still primarily serves the interests of the existing component states⁴⁵ and shields these states against any drastic changes. Accordingly, scholars of international law will usually proceed from the assumption that, since the end of the colonial era, a fixed number of states have been established and that, bar a few exceptions, the history of state formation has basically reached its final stage of development.⁴⁶ The formation of new states, originating from the wishes of distinctive communities, which were forced to inhabit a certain territorial state due to the arbitrary determination of international boundaries, are usually only acceded to after fierce opposition and contrition. The most important international organisations, with the UN and the African Union (and its predecessor, the Organisation of African Unity) in the forefront, are the trusted guardians of the existing statist order, protecting it from any noteworthy changes and prohibiting the formation of new states out of existing states. The said organisations are by and large firmly opposed to any conception of self-determination that can give rise to the re-demarcation of international boundaries and the formation of new states. The UN's support of the process of decolonisation was no exception to this. On the contrary, it was part and parcel of the general pattern of maintaining existing international boundaries. In terms thereof, the UN supported decolonisation on the basis of the prototerritorial states (the colonies) created by the erstwhile colonial powers, i.e. on the basis of the artificial boundaries determined by those powers and without taking any demographic factors, or the will of the erstwhile colonised populations, into account.⁴⁷ The states that were consequently left to their own devices after the colonial masters had left Africa, are states demarcated by colonial frontiers, carved out in an arbitrary fashion on the African continent and imposed on African populations.⁴⁸ This course of conduct also established the territorial statist order in the former colonised territories.

The three fundamental premises of the international statist order mentioned earlier – statist sovereignty, territorial integrity and a prohibition on interference in the internal affairs of states – also give rise to a distinctive notion of self-determination. It is a statist (more particularly, a territorially statist) notion of self-determination. In terms of this, the right to self-determination vests in the territorial state as a collective entity, irrespective of the divergent interests, needs and political aspirations of the heterogeneous populations that

⁴⁵ A Heraclides 'Secession, self-determination and nonintervention: in quest of a normative symbiosis' (1991) 45 *Journal of International Affairs* 4.

⁴⁶ C Tomuschat 'Self-determination in a post-colonial world' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 5.

⁴⁷ SJ Anaya 'The capacity of international law to advance ethnic and nationality rights claims' in W Kymlicka (ed) *The Rights of Minorities* (1995) 324.

⁴⁸ See chapter 6.1.

inhabit it. This remains the case, notwithstanding the fact that the political aspirations of nondominant communities in such multinational states may be suppressed by a dominant community and, the cultural identity of such communities may be crudely disparaged. An equitable constitutional accommodation of the aspirations of nondominant communities – especially of national minorities – will naturally upset the sovereignty of existing states and effect adaptations to existing international frontiers, which might cause the state *territorium* to shed its inviolable nature. Therefore, the existing statist order cannot be maintained, should equitable recognition be afforded to the political aspirations of national communities inhabiting such (multinational) territorial states. By applying the statist paradigm and serving statist identity, a conception of statist self-determination must therefore necessarily be adopted, in terms of which self-determination will vest in the state itself, and not in any particular communities. Such conception of statist self-determination accords and forms a logical totality with state building, statist democracy and statist human rights, discussed in chapters 6, 7 and 8. All of these are manifestations of the statist paradigm and are servants of a statist identity.

As opposed to the statist self-determination of the existing international order there is an alternative view of the principle of self-determination. It is national self-determination in terms of which it is not the state, but national communities – peoples or cultural communities – who are entitled to the right to self-determination. Viewed from the perspective of the territorial-statist status quo, this principle is radical and undermining,⁴⁹ for if it were to be implemented, it would be impossible to keep the present statist status quo intact. The traditional principles of statist sovereignty, territorial integrity and statist self-determination are the very guardians of such a status quo against any radical changes and disruption that would certainly follow upon the implementation of the principle of national self-determination.⁵⁰ The fact that traditional international law looks askance at national self-determination can be ascribed to the pressure that national self-determination exerts on the existing statist order.⁵¹

In international law, a conflict thus arises between conservative traditional statist sovereignty, reflected in the principle of territorial-statist self-determination, of which the paramount aim is to keep the

⁴⁹ Cassese (n 43 above) 340.

⁵⁰ Cassese (n 43 above) 317-317, 325; Anaya (n 47 above) 327.

⁵¹ Anaya (n 47 above) 327.

existing territorial state intact, as opposed to national self-determination,⁵² which in turn displays a human rights nature and regards the equal constitutional accommodation of national communities as paramount, often demanding an alteration of the existing statist order, in order to achieve such goal.

3.1 History

The modern notion of national self-determination arose after the First World War, when the incumbent president of the USA, Woodrow Wilson, and the Bolshevik leader, Vladimir Lenin, tried to implement the notion of self-determination as the key to adjusting the erstwhile world order.⁵³

At the time Wilson's conception of national self-determination had sweeping implications for the world order. Wilson regarded the will and aspirations of peoples as the decisive criterion for any adjustment to international boundaries, particularly in the conquered multinational Turkish and Austrian-Hungarian empires.⁵⁴ On 11 February 1918, when the war was nearing its end, Wilson declared:

... every territorial settlement in this war must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims among rival States.⁵⁵

Wilson's ideal was therefore to mould the state in the form of the nation (people),⁵⁶ thereby creating nation states (the Afrikaans equivalent is *volkstate*) out of the conglomerate of empires. If this principle were to have universal application, it would have seriously disrupted the statist order obtaining at the time, causing the disintegration of a great number of culturally and ethnically heterogeneous, multinational territorial states. If national self-determination à la Wilson's conception were implemented, it would have had the effect of *creating nations, but breaking states* – to paraphrase Vernon van Dyke's views.⁵⁷

Wilson's notion of self-determination greatly deviated from the statist paradigm. In chapter 6 it was explained that the statist

⁵² Cassese (n 43 above) 316-335; see also WM Reisman 'Sovereignty and human rights in contemporary international law' (1990) *American Journal of International Law* 866 *et seq.*

⁵³ Cassese (n 43 above) 14-23; GN Barrie 'Self-determination in modern international law' (1995) *Konrad Adenauer Stiftung Occasional Papers* 3.

⁵⁴ Cassese (n 43 above) 20.

⁵⁵ Quoted by Cassese (n 43 above) 20.

⁵⁶ HA Strydom 'Die volkeregtelike integreringsfunksie van die VVO' unpublished LLD thesis, University of South Africa (1989) 158; R Emerson *From empire to nation: the rise to self-assertion of Asian and African peoples* (1971) 463.

⁵⁷ Strydom (n 56 above) 158.

paradigm elevates the state as the active agent for determining political and legal arrangements. Traditional international law, in which statist sovereignty and territorial immutability are of key importance, likewise establishes the state as the active role player and main beneficiary in the international sphere. With Wilson, one deals with reverse logic: the nation (people, *volk*), instead of the state, becomes the active agent and the primary beneficiary.

The principle of national self-determination was, however, generally rejected in the treaties that were concluded after the end of the First World War.⁵⁸ This happened notwithstanding Wilson's efforts.⁵⁹ Due to the absence of the mechanism of self-determination, in some instances national minorities were protected by way of protective treaty provisions.⁶⁰

Self-determination would have gone hand in hand with the disintegration of existing states and the establishment of new ones. Self-determination therefore assumes that political power will be granted to every people within a sovereign state. The granting of minority rights does not, however, have such far-reaching implications. It is still maintaining existing states and, furthermore, fails to grant any autonomous political power to minorities within a heterogeneous state. However, to a certain extent it does protect the cultural and linguistic assets of minorities against the will of the majority.

Therefore, minority rights can be regarded as a strategy for preventing the more far-reaching implications of self-determination, which would entail the redemarcation of international frontiers. Minority rights are, as it were, a substitute for self-determination. It also accommodates situations where communities live in such an integrated fashion that there is no meaningful way to accomplish a territorial arrangement through which self-determination could be accomplished.

Notwithstanding Wilson's influence, the principle of self-determination has remained restricted to politics and could not succeed in gaining recognition as a legal principle. State sovereignty and territorial inviolability continued to enjoy precedence.⁶¹

Lenin was the other great promoter of self-determination. His approach differed from Wilson's in that he focussed exclusively on the

⁵⁸ On the conventions see T van Wyk & M Boucher (eds) *Europe 1848-1980* (1986) 249-252.

⁵⁹ Cassese (n 43 above) 25; Barrie (n 53 above) 4.

⁶⁰ Cassese (n 43 above) 26-30.

⁶¹ Cassese (n 43 above) 33.

liberation of the colonial territories, and not on a general right to national self-determination.⁶² Lenin's idea of self-determination was aimed at enlisting the indigent colonial populations, as part of the proletarian forces, to assure the success of the international Bolshevik revolution. It formed part of a strategy within a Bolshevik framework. Differing from Wilson in this respect, his notion of self-determination was not a general political principle (and aspiring legal principle) through which a new world order should have been established.

When Lenin raised his idea of self-determination for the first time, it was also likely to have radical implications. At that stage, colonial emancipation was hardly contemplated at all. However, the colonial notion of self-determination comprised much less than Wilson's conception of (national) self-determination. Lenin's views — motivated by the socialist world politics of Bolshevism — were aimed only at the colonial territories, and therefore his notion became irrelevant once the process of decolonisation was completed. Wilson's conception of self-determination, on the other hand, was of general significance. It applied to all peoples, colonial as well as non-colonial, and therefore it would remain relevant and become even more important after the colonial period had come to an end.

It is clear that from the very beginning there were two conceptions of self-determination: a restricted colonial conception and a general universal conception. After the Second World War and especially after the decolonisation process had run its full course, the tension between these two conceptions would become more intense. As will be explained shortly, the colonial conception came to represent the conservative view, which was aimed at conserving the international order in the form it had assumed immediately after decolonisation. On the other hand the conception of national self-determination was aimed at further reforming the world order in conformity with the need of state formation and by taking the variety of peoples into account.

The notion of self-determination resurfaced after the Second World War with a qualitatively new appearance, namely not only as a political doctrine as previously, but as a legal principle.

Article 1(2) of the Charter of the United Nations specifically provides that one of the goals of the United Nations is:

to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen peace.

⁶² Cassese (n 43 above) 14-19; Barrie (n 53 above) 3-4.

Although the reference to self-determination in this provision is not of much practical significance, it is nevertheless meaningful as the concept of self-determination thereby acquired legal status and, in addition, it was incorporated into the most important multilateral conventions.⁶³ The potentially real significance of the national self-determination of peoples is further reinforced by the fact that the realisation thereof has been expressly formulated as one of the objects of international economic and social cooperation.⁶⁴

After another two decades, national self-determination received further legal recognition when it was incorporated in identical terms as in article 1, into the two most important UN human rights conventions, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Subarticle 1 of the two provisions reads as follows:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Apart from being reflected in multilateral-conventional law, the principle of self-determination was also echoed in some of the most prominent UN resolutions.

Article 2 of the General Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples⁶⁵ recognises national self-determination in the selfsame terms as those employed in the provisions of the 1966 covenants which have just been mentioned. Although a resolution of the General Assembly has no legally binding force, the resolution in question is nevertheless significant. In the erstwhile colonial territories, and particularly in Africa, it was regarded as one of the most important resolutions – if not the most important – ever to be adopted by the General Assembly. The adoption of this resolution, furthermore, went hand in hand with the acquisition of independence of a great number of Third World states. The view contained in the Declaration can therefore be regarded as the *opinio iuris* element of binding international customary law, on self-determination.⁶⁶

⁶³ Cassese (n 43 above) 43.

⁶⁴ Article 55 of the UN Charter. See also article 76 of the Charter in which self-determination, albeit in other terms, is formulated as one of the ultimate goals of the system of Trusteeship.

⁶⁵ General Assembly Resolution 1514 (XV) of 14 December 1960.

⁶⁶ See for example Emerson (n 56 above) 460-461.

The right to self-determination also receives recognition in the General Assembly's Declaration on the Principles of International Law on Friendly Relations and Cooperation among States according to the Charter of the UN.⁶⁷ This resolution likewise represents one of the most important stances ever taken by the General Assembly.⁶⁸

The principle of self-determination is also included in regional conventions. In Europe, the 35 states (at the time) of the Conference on Security and Cooperation in Europe adopted the Helsinki Final Act on 2 August 1975,⁶⁹ which provides for a very comprehensive definition of the right to national self-determination. It reads as follows:

By virtue of the principle of equal rights and self-determination of peoples all peoples always have the right in full freedom to determine when as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic and cultural development.

Although the declaration does not in itself constitute binding law, it is nevertheless an important indication of a growing *opinio iuris* in favour of national self-determination as enforceable law.

3.2 Analysis

The impression created by the many instances of endorsement of national self-determination, is that the traditional principles of statist sovereignty and territorial integrity have yielded. It is self-evident that one has to accept that the existing international frontiers will have to be reviewed in order to give due expression to the principle of national self-determination. It would therefore appear as if existing international law is showing some signs that it may yield under the pressure of national self-determination.

It is true that the cornerstones of international law are under pressure. Nevertheless, legal measures were meticulously put into place to assure that the stereotypical principles of statism can survive the assault of national self-determination, thereby protecting the stability of the statist international order against state fragmentation

⁶⁷ General Assembly Resolution 2625 (XXV) of 15 December 1970.

⁶⁸ Barrie (n 53 above) 8; I Brownlie Basic documents of international law (1972) 32.

⁶⁹ Cassese (n 43 above) 284.

and secession, which often follows national self-determination.⁷⁰ In this way the struggle between the traditional principle of territorial integrity and national self-determination, which may cause secession,⁷¹ is consistently resolved in favour of the traditional principle.⁷² In each of the instruments just referred to, in which self-determination is endorsed, provisions are also incorporated in terms of which the real implications of self-determination are restricted. Therefore, although a first reading of the instruments may leave one with an impression of progressiveness, any further consideration of these instruments will demonstrate that for the most part they are merely refined shades of the statist paradigm.⁷³ Consequently, statist identity will also retain its advantageous position vis-à-vis national identity or, for that matter, any identity that can possibly pose a threat to statist identity.

(a) Article 1 of the 1966 covenants

After the completion of the preparatory work for the adoption of article 1 of the 1966 covenants, self-determination has generally been accepted as a general entitlement, accruing to all peoples and not restricted to colonial populations.⁷⁴ The wording of the provisions that contain references to *all peoples* also leave no doubt about the universal impact of the entitlement to self-determination. The issue, however, was not that simple. The preparatory work for the provision, which could be used to assist in the interpretation process,⁷⁵ removes all doubt that the provision concerned did not envisage a right of secession and that there was indeed some anxiety that the provision might be employed to that end.⁷⁶

In addition, article 1 must be read in conjunction with article 27 of the International Covenant on Civil and Political Rights, which provides for minority rights. It reads as follows:

⁷⁰ The formation of new states, free association of a national group living within a territory in state A with state B, or the integration of a territory in an existing state into another are all possibilities brought about by secession. See R McCorquondale 'South Africa and the right of self-determination' (1994) 10 *SAJHR* 7. On the distinction between external and internal self-determination see P Thornberry 'The democratic and internal aspect of self-determination with some remarks on federalism' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 101-102.

⁷¹ Barrie (n 53 above) 27.

⁷² GN Barrie 'Uti possidetis versus self-determination and modern international law: In Africa the chickens are coming home to roost' (1988) *TSAR* 451.

⁷³ The Helsinki Declaration may be a further exception to it, as will appear from the subsequent discussion in this chapter.

⁷⁴ Cassese (n 43 above) 51.

⁷⁵ Article 32 of the *Vienna Convention on the Law of Treaties of 1969*.

⁷⁶ Cassese (n 43 above) 51.

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

On this basis the convincing argument is sometimes raised that the *prima facie* general operation of article 1 basically has to be qualified by article 27. Accordingly, ethnic groups are precluded from founding their claims to self-determination on article 1. Within the context of the covenant in question, members of ethnic, linguistic and religious minorities have to rely on the individual rights provided for in terms of article 27.⁷⁷ In view of article 27, article 1 appears not to be applicable to the minority groups concerned.

It would appear that the wording of article 1 does not accurately convey its actual meaning. It does not intend to create a meaningful right to self-determination in favour of all peoples. UN actions, for the most part critical of secession movements, also confirm that the provision must not be taken literally.⁷⁸ The provision creates no right to self-determination for all peoples, even less so an external right to self-determination, which might possibly lead to new state formation.

(b) General Assembly Resolution 1514 (XV) of 14 December 1960

Although Resolution 1514(XV) provides for national self-determination, such right is basically qualified in paragraph 6, which reads as follows:

Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

When paragraphs 2 and 6 of the Resolution are considered in conjunction, it would appear that a people, forming a segment of the state population, will indeed be precluded from exercising self-determination. Only an entire state population could exercise self-determination. The arbitrarily determined frontiers of the erstwhile colonies are therefore taken as a fixed point of departure and self-determination can only be exercised within the fixed physical confines of such international frontiers. The way in which self-determination may be exercised in terms of this resolution, has been regulated in such a way as to guarantee the meticulous upholding of the colonially determined geopolitical map.

⁷⁷ Cassese (n 43 above) 59-62.

⁷⁸ Emerson (n 56 above) 462-463.

It follows that any claim to self-determination by national and ethnic groups will be denied in order to maintain the old colonial boundaries. The precedence enjoyed by the preservation of colonial boundaries causes ethnic groups, arbitrarily coerced into a colonial 'people', to be denied the right to make free constitutional choices.⁷⁹

The elevation of the entire colonial population to the position of the entitled party, endowed with the power of exercising a choice in respect of self-determination, logically and strategically corresponds with the phenomenon of state building (nation building) discussed in chapter 6. State building operates in respect of the entire state population as a permanent and inviolable entity, irrespective of the fact that such state population was artificially established by arbitrarily demarcated international boundaries. In the context of the resolution at hand, self-determination proceeds from the same premise. State building aims to establish an homogeneous state nation, by whom the varied aspirations and sentiments of a variety of ethnic, cultural and linguistic groups are regarded as stumbling blocks that obstruct the formation of a state nation. State building therefore regards nations (peoples) as an antagonistic centrifugal force, bent on frustrating the goal of establishing the state nation. In terms of state-building strategies, efforts are made to neutralise this centrifugal force. Self-determination contemplated by the resolution under discussion, endeavours to attain the same goal as state building. Likewise it treats the variety of national, peoples' and linguistic groups as antagonists. Accordingly, national, linguistic and ethnic groups are denied the status of entitled parties for the purpose of exercising the right of self-determination. State building and statist self-determination are therefore two aspects of the same mutually complementary strategy. One of them functions internally, and the other at an international level. Both are substrategies within the same statist paradigm and both contribute to the preservation of state identity and endeavour to destroy any nonstatist claims to self-determination. Both contribute to the unity of the faithful and undivided nation of Leviathan – the mortal god.

(c) General Assembly Resolution 2625 (XXV) of 15 December 1970

Although the right to self-determination also features in this resolution, it is qualified in such a way – as in the 1960 resolution – that its real implications are essentially rather minimal. Self-determination is ultimately basically restricted in favour of the territorial integrity and political unity of the existing states, for the resolution provides *inter alia* as follows:

⁷⁹ Cassese (n 43 above) 73-74.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The provision was formulated rather quaintly. It fundamentally implies that when the government of a sovereign state represents the entire population, without any discrimination as to the exercise of political rights, the principle of self-determination will be regarded as having been complied with. Consequently, if everyone in the state has equal access to the processes of political decision-making and all groups have been granted equal access to political institutions, the government of such state will be regarded as having complied with the principle of self-determination. A group within the state will therefore only qualify to claim the right to self-determination as a group, if access to government institutions has been restricted on a basis of race, culture, or religion.⁸⁰

The General Assembly is extremely loath in granting rights to national and similar communities. The right to self-determination in the form of secession only arises when a group has been denied the *procedural* right of participation in the political process of decision-making. It was explained in detail in chapter 7 that such procedural rights (especially the right to vote) often create a mere semblance of democracy, behind which majority domination in a heterogeneous state can easily be concealed. Although procedural rights therefore do not always succeed in attaining democracy, the General Assembly was satisfied that this resolution would create a satisfactory guarantee for a democratic order — the type of democracy in which the majority group within a state population will always enjoy preference in disregard of the interests of minorities. This is the very reason why this type of democracy is referred to as statist democracy. What the General Assembly accomplished with this resolution, was to support the crude and unrefined notion of statist democracy with its often oppressive implications for non-dominant communities, and to endeavour to entrench it as a principle of international law.⁸¹ Despite the serious flaws of this form of democracy, the General Assembly is quite content that compliance with it will be sufficient to satisfy a people's entitlement to self-determination. In effect, it does not satisfy but frustrates the entitlement to self-determination. The resolution only makes allowance for an extremely restricted

⁸⁰ Cassese (n 43 above) 112.

⁸¹ McCorquodale (n 70 above) 20.

opportunity for external self-determination and secession. In fact, the quoted passage has already been described as a formal warning against the threat of secession.⁸²

The balance of scholarly commentary regarding this resolution is that it acknowledges secession as a last option only in those cases where there is no remaining remedial measure against discrimination. However, the possibility of secession remains a contentious issue, even in this confined sphere.⁸³

U Thant, Secretary General of the UN at the time of the adoption of this resolution, also made it clear that the resolution should under no circumstances be interpreted as a justification for secession. He expressed himself as follows in this regard:

As far as the question of secession of a particular section of a Member State is concerned, the United Nations position is unquestionable. As an international organization the United Nations has never accepted and does not accept and I do not believe it will ever accept a principle of secession of a part of a member State.⁸⁴

(d) *Uti possidetis and self-determination according to the AU and OAU*

The doctrine of *uti possidetis iuris* was established in the first quarter of the nineteenth century, when the former Spanish colonies in South America gained their independence.⁸⁵

This rule is intended to stop the clock, with regard to the determination of the international frontiers of the former colonial territories, at the moment of their independence.⁸⁶ The principle thus confirms the permanence of the state frontiers inherited from the colonial era.⁸⁷ The rule obviously purports to prevent the territorial dispensation of states that have just gained their independence from being disrupted by internal centrifugal forces.⁸⁸ *Uti possidetis* gives preference to the legal title that was obtained by arbitrarily demarcated territories by means of colonialism, above human misfortunes brought about by the occupation and settlement patterns of territories by specific peoples and communities.⁸⁹ It

⁸² Tomuschat (n 46 above) 5.

⁸³ D Murswiek 'The Issue of a Right to Secession reconsidered' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 27.

⁸⁴ Quoted by Murswiek (n 83 above) 24.

⁸⁵ Casese (n 43 above) 190; Barrie (n 72 above) 452.

⁸⁶ Cassese (n 43 above) 192.

⁸⁷ Barrie (n 72 above) 452.

⁸⁸ Barrie (n 72 above) 453; D Manganye 'The application of *uti possidetis* and South Africa's internal border' (1994) 35 *Codicillus* 51.

⁸⁹ Barrie (n 72 above) 453.

permits colonially demarcated territories to be the final judge of peoples instead of accomplishing the contrary, namely that peoples will have the final say with regard to *territorium*. As in the case of state building, the state – in the sense of a demarcated *territorium* – is the active agent to which everybody must conform and in the interest of which state nations are created and cultural, linguistic and ethnic groups must, if necessary, transformed.

The *uti possidetis* principle was initially incorporated into a few national constitutions and bilateral treaties in South America.⁹⁰ Over time, the principle has steadily developed and nowadays it is recognised as a universal principle of international law. The International Court of Justice held that *uti possidetis* was not only applicable to a certain region, and came to the following conclusion in respect of the principle:

Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fractional struggles provoked by the challenging of frontiers following the withdrawal of the administering power.⁹¹

The *uti possidetis* principle also conforms to the approach followed in the resolutions of the General Assembly of the UN.⁹² It was, however, in Africa in particular where the principle was received most yearningly and where it is presently enjoying the strongest support.⁹³ When the former African colonies became decolonised, a situation arose akin to that which occurred in South America 150 years before. The fear also arose that ethnic, cultural and religious ties, which were disregarded during the initial demarcation of colonial boundaries, might redefine the arbitrary frontiers to such an extent that Africa's political geography would be totally disrupted, something which might lead to intolerable political instability. The new African states had no difficulty in choosing between national self-determination and the retention of the arbitrary lines that were drawn across the African continent by the previous colonial powers. The choice fell on the latter, without any further ado. This choice is strikingly ironic: those emancipated peoples who had been yearning to shed the yoke of colonialism for so long, embraced one of the most blatant deeds of the colonial powers without even the slightest blink of an eye and still cherish this colonial heritage to this day.

⁹⁰ Casesse (n 43 above) 190.

⁹¹ Frontier Dispute Case *Burkina Faso v Mali* ICJ Reports 1986 554 para 29.

⁹² Casesse (n 43 above) 191; McCorquondale (n 70 above) 9.

⁹³ Barrie (n 72 above) 456.

During the constitutive summit of the Organisation of African Unity in 1963, the principle of maintaining existing international boundaries was elevated to one of the organisation's own principles. In article III(3) of the Charter of the OAU member states commit themselves to laying down the principle of respecting the national sovereignty and territorial integrity of every member state and respecting the inalienable right of all states to an independent existence. In article VI member states solemnly commit themselves to comply with this principle.⁹⁴

At the first summit of the OAU in Cairo in 1964, African leaders found it necessary to deal with the frontier issue in particular. The product of their deliberations was the Resolution on the Intangibility of Frontiers. In this instrument the African heads of state declare *inter alia* that the state frontiers in Africa had become an immutable reality at the moment of independence and further pledge to respect such frontiers as they existed at that moment.⁹⁵ The Constitutive Act of the African Union of 11 July 2000, which came into force in 2001, reconfirmed the principle.⁹⁶

The principle of *uti possidetis* was thereby entrenched in Africa and at the same time a legal taboo was placed on exercising national self-determination.

(e) *The Helsinki Final Act*

The most liberal and generous definition of national self-determination is contained in this instrument. In terms of the definition of the Helsinki Final Act all peoples, and not only the populations of colonial territories, are entitled to the right to self-determination. Furthermore, it is defined as a *ius continuum* — a continuous right — thereby vesting self-determination with a dynamic nature, contrary to colonial self-determination that can only be exercised once, and is therefore inherently static in nature.⁹⁷

This implies that the way in which self-determination may be exercised varies in accordance with the varying expressions of opinion of every specific people. From this perspective self-determination is merely an element of real democratic politics.

⁹⁴ Charter of the Organisation of African Unity of 1963 contained in GJ Naldi (ed) *Documents of the Organization of African Unity* (1992) 4.

⁹⁵ Resolution AGH/RES 16(1): 'Resolution on the Intangibility of Frontiers' contained in Naldi (n 94 above) 49.

⁹⁶ Article 4(c) of the Constitutive Act of the African Union (AU).

⁹⁷ Casesse (n 43 above) 285.

Nonetheless, this instrument still contains certain traditional elements bent on protecting the inviolability of international frontiers. In principle III the integrity of state frontiers is addressed as follows:

III. Inviolability of frontiers

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

To this one should add that minority rights are comprehensively provided for in the context of the Conference on Safety and Cooperation in Europe. As a result of such provision for minority rights, the demand for recognition of self-determination in the form of an own sovereign state has declined appreciably. In so far as provision is made for self-determination the threat of secession is simultaneously being guarded against. Therefore, instead of having to follow the more drastic course of making a choice in favour of external self-determination by way of secession, self-determination is in fact exercised within existing states by means of an arrangement that provides for minority rights.

This, however, does not detract from the progress that has indeed been made in promoting self-determination. In conjunction with the detailed provision for minority rights, the extended and continuous right to self-determination has caused a considerable slackening of the state's stranglehold. Due to the acknowledgement of such rights, statist identity is undoubtedly on its back foot.

In spite of the importance of the Helsinki arrangement and its subsequent confirmation, it is only in force among the 35 signatory states. Its ultimate influence might, however, have a much wider rippling effect.

3.3 Statist versus national self-determination: the domesticating concept of self-determination

Since the Second World War, the principle of and entitlement to national self-determination has most definitely been making progress to the detriment of statist sovereignty and the territorial integrity of states.⁹⁸ Compliance with the *uti possidetis* principle came under immense pressure as a result of the spectacular disintegration of the totalitarian empire of the Soviet Union and of states such as

Yugoslavia and Czechoslovakia at the end of the twentieth century.⁹⁹ and also with the independence of Eritrea in 1991, Kosovo in 2008 and South Sudan in 2011. Where, until fairly recently, secession had been handled as an anachronism, it has now made a forceful comeback to contemporary politics.¹⁰⁰ The decline of central control within formerly strong unitary states and the incidental trend towards federalism instead of unification, as well as the devolution of political authority to smaller and more homogeneous political units in terms of adjusted constitutional arrangements, are evidence of the progression of national self-determination.

Self-determination (statist self-determination at an earlier stage and national self-determination at present) constantly functions as a strong progressive force in politics, international law and constitutional law. It contributes to the transformation of the existing order and the liquidation of colonial empires. It contributed to decolonisation and is presently a force that threatens the centralised power of multi-ethnic states for the sake of empowering the enormous variation of ethnic, cultural and linguistic communities that inhabit such states. It is a potent democratising force. For this very reason, as explained earlier, self-determination takes an antagonistic stand vis-à-vis the traditional conservative doctrine of statist sovereignty and the territorial integrity of existing states. National self-determination has meanwhile also achieved some success in undermining the traditional statist orientation of international law.¹⁰¹ As already pointed out, self-determination is not a logically coherent concept and the conflict between territorial-statist and national self-determination still continues.¹⁰²

Territorial-statist self-determination is associated with the post-war decolonisation of the erstwhile colonial territories,¹⁰³ in contrast with national self-determination which as a concept had originated in Wilson's notions. The latter concerns the self-determination of ethnic communities, peoples and nationalities, mainly determined by language and culture. Territorial self-determination deals with the self-determination of a territorially defined political entity in the guise of a colonial territory in which the linguistic, ethnic and cultural elements are irrelevant.¹⁰⁴ The varying aspirations of communities who may have been boxed against their will into specific state boundaries are disregarded. What is of primary relevance in this respect, is the yearning of the existing territorial state for inviolable

⁹⁸ Casesse (n 43 above) 334-335.

⁹⁹ Barrie (n 72 above) 456.

¹⁰⁰ Heraclides (n 45 above) 1.

¹⁰¹ Casesse (n 43 above) 165.

¹⁰² M Moore 'On national self-determination' (1997) 45 *Political Studies* 900.

¹⁰³ Emerson (n 56 above) 463; Strydom (n 56 above) 172.

¹⁰⁴ Emerson (n 56 above) 463.

sovereignty.¹⁰⁵ Accordingly, equal rights of individuals and communities are of lesser importance.¹⁰⁶

Statist self-determination, which reflects the reigning positive law position, represents the conservative trend in the self-determination discourse. Accordingly, the right to self-determination had already been finally exercised long ago, with the demise of the erstwhile colonial empires, and the self-determination discourse had simultaneously been buried. There is also a headstrong refusal to take cognisance of the unacceptable domination to which many national communities are still being subjected; even the oppressed position of a numerically strong people like the Kurds is accepted almost without objection.¹⁰⁷ In contrast with this conservative statist conception of self-determination, there is the progressive conception, which is sensitive and averse to the oppression of national communities within the statist order. According to this view, the lack of political freedom and the equal treatment of dominated peoples must be addressed, either by employing the more radical method of secession, or at least by the scaling down of centralised state control, with a concomitant devolution of political power to national communities. Alternatively, national self-determination can be addressed by following a human rights approach in terms of which the right to cultural survival and integrity of national communities must be regarded as a basic human right and enforced against the state.¹⁰⁸ Although such right will have no effect on international law, it will pave the way for the adjustment of the constitutional arrangements in a state, in terms of which internal self-determination might be realised. It also serves as a defence against nation-building projects in terms of which particular languages and cultures have to be abandoned to appease the statist Leviathan.

According to statist self-determination, the right of national communities to determine their own affairs is either denied, or restrictively interpreted. In terms of national self-determination the right of national communities to determine their own affairs is treated accommodatingly. Accordingly, it is demanded that the statist order — fixed frontiers, central state control etc — yields in order to accommodate national self-determination. Statist self-determination concerns itself with the integrity and interests of the territorial state, as well as the preservation of the existing statist

¹⁰⁵ Sometimes territorial self-determination is referred to as the national aspect of self-determination, and to national self-determination as the democratic aspect of self-determination. See Thornberry (n 70 above) 120. Although the last comparison makes sense, the first one is inopportune due to its equation of nation and state.

¹⁰⁶ P Malanczuk *Akehurst's Modern Introduction to International Law* (1997) 326.

¹⁰⁷ Barrie (n 53 above) 28.

¹⁰⁸ Anaya (n 47 above) 325.

order. The varying will of national communities — the democratic element of national self-determination — is irrelevant in terms of statist self-determination. National self-determination, on the other hand, affords preference to the democratic element, i.e. the right of communities not to be dominated by stronger and numerically superior groups, but to determine their own affairs instead, and accordingly to change the statist order *inter alia* by means of secession.¹⁰⁹

When one considers the two conceptions of self-determination, the domesticating operation of the statist paradigm strikingly comes to the fore. Such is the case:

Self-determination entered the realm of politics and the law as a progressive, albeit undermining, concept that threatened the existing order,¹¹⁰ when it was applied for the accomplishment of the liberation — state formation — of territories that had previously been under colonial control. The comprehensive framework of the statist paradigm and especially the frontiers of the colonies that had already been demarcated by the colonial powers, were employed to establish a number of new territorial states. However, as a result of all the provisos contained in the aforementioned international legal instruments and the *uti possidetis* principle, which all require the preservation of existing state frontiers, any possible further application of the concept in the interest of self-determination of national communities by creating new states, is being hampered. Whereas self-determination took off as a progressive force, it has by and large divested itself of that character. In its guise as statist self-determination, it has now become a rather conservative force, which has to assist in entrenching the existing statist order. Self-determination has thereby been tamed to become an ultimate instrument of the statist paradigm, safeguarding the statist order. Like democracy, it has been absorbed by the statist paradigm and domesticated for the sake of the statist order. In this respect Alexis Heraclides correctly asserts:

The original revolutionary principle of self-determination, spawned by another epoch, threatened to wreak havoc with the world system and was therefore domesticated, or so it seemed until recently.¹¹¹

¹⁰⁹ Therefore secession is the method by which equal justice may be accomplished in favour of dominated communities. It corrects the injustice caused by the domination of nondominant communities in multinational territorial states and, as demonstrated by A Addis 'Individualism, communitarianism and the rights of ethnic minorities' (1992) 67 *Notre Dame Law Review* 624 and NB Buchanan 'Towards a theory of secession' (1991) 101 *Ethics* 233, can justifiably be regarded as a form of rectificatory justice.

¹¹⁰ Casesse (n 43 above) 340.

¹¹¹ Heraclides (n 45 above) 7.

Like democracy, self-determination has been domesticated.¹¹² In contrast, as explained above, both democracy and national self-determination are suspicious and antagonistic towards Leviathan, the statist lord.

Statist self-determination proceeds from the assumption that state and nation (cultural community) are virtually exchangeable concepts¹¹³ — these state populations reflect the image of the state. Accordingly, statist self-determination is based on the assumption that frontiers of the state frontiers coincide with those of peoples,¹¹⁴ which, of course, is not the case. According to this assumption, cultural identity and national identity are totally irrelevant for purposes of self-determination. On the basis of such self-determination international law creates a static legal framework in which state-building projects can be launched under the banner of nation building (discussed in chapter 6). Furthermore, it is within such fixed statist dispensations that statist models of justice (also discussed in chapter 6) are constructed. Margaret Moore accordingly calls attention to the logical and ideological coherence between statist self-determination and the justice model of someone like John Rawls.¹¹⁵ Early in his work, *A Theory of Justice*, Rawls stated that what concerned him was justice in a single community or state, altogether omitting from the discourse justification of existing frontiers. The political significance of cultural, and especially, national identity are totally ignored, as he concerns himself with the question of so-called fundamental *human* interests on the basis of which he constructs liberal rights and rules.¹¹⁶

Statist self-determination, domesticated democracy and (domesticated) nation building, or rather state building, therefore cohere as mutually complementary aspects of the same comprehensive statist paradigm, complementing each other in pursuing the same common goal, namely imposing statist identity. Satisfying Leviathan's needs is the driving force behind the functioning of these three strategies.

Statist self-determination is not only conservative; it is also morally intolerable. It serves the interests of the sovereign state that tries to maintain the same state frontiers, but at the same time represses the interests of aggrieved and dominated national communities that question the legitimacy of the dominating state.¹¹⁷

¹¹² See chapter 7.

¹¹³ R Falk 'The rights of peoples (in particular indigenous peoples) in J Crawford (ed) *The rights of peoples* (1988) 26.

¹¹⁴ Falk (n 113 above) 26.

¹¹⁵ On Rawls' justice model, see also chapter 6.4.1.

¹¹⁶ Moore (n 102 above) 903.

¹¹⁷ Moore (n 102 above) 902.

This kind of self-determination creates the possibility of oppression. One part of the population – usually an ethnic, cultural, racial, or religious majority group – employs statist self-determination to disparage the basic human rights of the rest¹¹⁸ and to impose a dominant statist culture on everybody.

What we see here is a form of internal imperialism. Imperialism should not merely be regarded as being restricted to the salt-water colonialism of a bygone era, where a colonial power from abroad dominated a local area and population. This old form of colonialism is obviously not the only way in which the immoral practices of colonialism may be exercised. When the dominating authorities blatantly or subtly try to impose their dominant state culture on everybody, they are also guilty of the imperialistic malpractice in respect of which Margaret Moore correctly asserts:

It might be politically correct to describe only Western powers controlling overseas territories as imperialists, but it is not factually correct: the term 'imperialism' can be coherently and persuasively applied to any attempt by one people to dominate politically another people, especially if the latter perceive the rule to be hostile to their national identity.¹¹⁹

An additional immoral element of statist self-determination lies in the fact that it acknowledges the right to self-determination of the overbearing majority alone: in terms of the rules of statist democracy, majorities are able to monopolise the official power apparatus and exercise (statist) self-determination at will. Without any moral justification, statist self-determination actually makes it impossible for minorities to exercise the right to self-determination.¹²⁰ Like statist democracy, statist self-determination plays a reproachable role in bolstering majority domination.

Statist self-determination turns its back on authentic democratic – albeit state-undermining – impulses of the original notion of self-determination. It embraces imperialism, the original evil targeted by self-determination, and becomes its staunch ally, instead of fiercely opposing it, as it had previously done.

In view of the criticism and the moral accusation levelled against statist self-determination, the time is ripe for the thorough reconsideration of the concept. One can therefore agree with Moore when she states:

¹¹⁸ Falk (n 113 above) 26.

¹¹⁹ Moore (n 102 above) 903.

¹²⁰ Moore (n 102 above) 902-903.

The increasing recognition, then, of the difficulties, philosophical and political, facing the territorial understanding of peoples on which the prevailing idea of self-determination in international law is based, points to the need to reconsider whether the principle of national self-determination might not be an appropriate starting point for the resolution of national conflicts.¹²¹

In the result, as Dillard J expressed it in an individual opinion in the Western Sahara case:

It is for the people to determine the destiny of the territory and not for the territory the destiny of the people.¹²²

¹²¹ Moore (n 102 above) 905.

¹²² Western Sahara case: Western Sahara 1975 ICJ-Reports 12.

CHAPTER 10

POLITOCRACY

1 Introduction

The territorial state has for more than three centuries been the master concept in our theory and practice of politics and law. It has demarcated the boundaries of what was doable, thinkable, achievable and permissible in the public domain. At the same time, it had no mean impact on the civic and private domain. As explained in the preceding chapters, the need for preserving the statist order gave rise to the establishment of a statist paradigm in terms of which scholarly activity is directed towards protecting and maintaining the statist order. One of the basic premises of the statist paradigm is that the state does not presuppose a real community of people, but that it merely houses a population of *any number of persons*, regardless of the existence of any linguistic, cultural, ethnic, religious, hereditary or similar mutual ties. The only two common factors among individuals comprising the state population are, firstly, their habitation in the same *territorium* within which they pursue their private interests and, secondly, their being subjects of the same legal order. These are the fundamental elements of the statist *community* comprising of detached individuals, who exist in an atomised state and are bent on satisfying their own private needs and furthering their own private interests and preferences. In so far as individuals may form part of a linguistic, religious, ethnic, cultural or similar group, such fact will be totally fortuitous and indeed irrelevant in respect of the legal and political arrangement of the public order. Such groupings merely have private significance and may not be treated as a public reality in defining the nature of the state. In the public order — law and politics — there are only two relevant entities: the individual and the state. Due to the boxing-in of such groupings within the private domain, the state is neutral, or at least purports to maintain group neutrality.

In the disciplines of law, political science and related fields, scientific scholarship in terms of the statist paradigm endeavours to guarantee the inviolate preservation of the existing statist order in

various ways. As explained in the preceding chapters, it restricts key conceptions of politics in such a way that it should help to safeguard the statist order against any challenge and disruption. By following the statist paradigm, democracy has been confined to fulfilling a servant's role towards the statist order, bent on protecting the status quo against any change. In this process the democratic ideal of maximum direct self-government and the empowerment of individuals and communities, have fallen by the wayside. Furthermore, statist democracy has, especially in multi-ethnic and multicultural states, contributed to the disappearance of democracy and the appearance of precariocracy (see chapter 7.3) and the domination of nonhegemonic groupings by hegemonic groups within the territorial state. The fiction of legitimacy maintained by statist democracy plays a misleading role by misrepresenting illegitimate and immoral precariocracy as legitimate democracy in order to indemnify the state against true democratic forces. The same applies in respect of self-determination which, in the form of statist self-determination – just as statist democracy – is shielding the territorial-statist order and harming minorities in heterogeneous states.

In its guise as Leviathan, the territorial state also has the character and appearance of a divine being – the mortal god. It is a jealous god, amassing a faithful flock – a nation reflecting his image and echoing his voice. It is a nation – a state nation – that has to be forged into a single nation by means of state-building programmes (see chapter 6). The nation has been converted from its errant ways, its preoccupation with particular identities, cultures and languages. The primary, unwavering and most profound loyalty is due to Leviathan. Cultural and linguistic communities might even speak their own languages and pursue their own cultures within certain limits. Under pressure, Leviathan might perhaps make the concession of allowing such communities to exercise certain cultural and linguistic rights as minorities, but ultimately everyone still owes Leviathan their highest allegiance; everyone still has to be children of the mortal god – and of nobody else. Although members of minority groups might have some rights, political power and entitlements for entire minority groups are extremely displeasing to Leviathan. State building converts individuals who are guilty of pursuing nonstatist dissident identities and reshapes them to become statist beings who cherish their statist identities.

However, Leviathan is also a caring god. He goes even further by representing himself as an empowering being. He vests his citizens (his subjects) with a growing number of rights – human rights – which grant them more entitlements against the state and simultaneously saddles the state with more duties towards its citizens (see chapter 8). By granting such rights the state gradually gains more prominence as a protector, care-giver and teacher. The aloof seventeenth-century

Leviathan has shed his erstwhile timidity of the era of Thomas Hobbes. Aware of the needs of his citizens, he has granted them a growing number of human rights. He also increasingly becomes a more active provider in respect of needs for which he previously accepted no responsibility at all. However, the state nation pays a high price for all of this: that of a growing dependence on the state. Leviathan might well have gained even more obligations and his duties might be ever increasing as more human rights are being acknowledged. This, however, benefits the state, for its duties have become so extensive and the concomitant individual dependence on the state so comprehensive that a life without Leviathan could barely be imagined. Thanks to human rights, the mortal god has made himself indispensable.

The legal measures designed in accordance with the statist paradigm provide the state with a final protective cushion. Only when state building would fail, when a section of the state nation would start losing their faith in the mortal god because of his inability to honour his human rights obligations, when the statist order would be questioned and the state be subjected to the pressures of self-determination exerted by local or similar centrifugal forces, the state's legal protective cushion will become operative. By enforcing the rules of criminal law pertaining to the crime of high treason, and by employing the international law rules regarding statist self-determination and secession (see chapter 9), allegiance to the state will be enforced by the state in demand of such allegiance and loyalty. The state will punish nonobservance of the duty of allegiance due to him and he will jealously guard the inviolable integrity of its state frontiers, no matter how inconsiderate the demarcation of the frontiers might have been to the populations that were boxed into territorial states.

Is the age-old mortal god on his deathbed? Has he been challenged to such an extent by the forces of globalisation and the demands of particular (cultural, linguistic and ethnic) communities and has he lost touch with late-modernism's variety of identities to such an extent that he is finally yielding? Could we envisage a dispensation beyond Leviathan and would a sense of personal independence and community autonomy, self-care, active citizenship and a political life from the perspective of particular communities create the possibility of a meaningful existence beyond Leviathan? Are we able to imagine the gratification of true democratic self-government, instead of the impoverished statist democracy to which Leviathan has surrendered us for the sake of his own survival? Do we reject the inexcusable immorality of precariocracy which statism has repeatedly foisted upon minority communities? Would the cherishing of personal self-esteem and a preference for self-governing communities unlock the door to a richer and more genuine democratic dispensation?

Are we able to emancipate ourselves from Leviathan? Are we able to lay the mortal god to rest with joy and thereafter enter into a meaningful political life? The way in which the statist paradigm has impoverished key political conceptions, as explained in the preceding chapters, and its resultant depressing effect, necessitate a positive response to these questions. The constant suggestion of a dispensation beyond statism has been the underlying basis of our discussions in these chapters. It would be a politocratic dispensation. It would be politocracy, of which the main traits will now be sketched.

2 Politocracy

2.1 Foundation

Politocracy defines a comprehensive politico-constitutional order: multispherical government by the citizens (*politai*) of every political community over the specific *res publica* — the commonwealth — of the relevant community.

The following discussion describes the main markers and core characteristics of politocracy. It suggests a response to the territorial-statist dispensation. The discussion is, however, not intended to represent something in the nature of a constitution, with all the technical detail associated with a document of such kind. Someday that will certainly come about through the labour of others. In this discussion we shall merely sketch the outlines, the basic premises, principles and some ideals of politocracy. It will introduce and concisely explain the core conceptions of politocracy. A discussion of the finer and more practical aspects, like the optimal size of the *habitative political community* at the end of this chapter, will rather be the exception, intended merely to explain and round off the general initial assumptions.

The concept of politocracy has been derived from the Classic Greek concept of *polis* - the city state. The *politai* — the citizens — were citizens of the polis and as such directly responsible for the government of the polis. Politocracy does not envisage a rebirth of the ancient *polis* system and a grafting of the political thought of those times (which in any event varied considerably) on the present situation. However, it takes cognisance of Classical Greek political thought and attaches particular importance to aspects of Aristotelian political thought. The restricted and solid political units of the Greek city states are also of fundamental importance to politocracy, just like the active citizens — the *politai* — and the close-knit communities that formed the basis of politics. The choice of the term '*politocracy*' is also substantiated by an alternative source. As will soon become apparent, one of the central traits of politocracy is that it aims to

grant recognition and give constitutional expression to multiple identities, multiple communities and multiple systems of government. In many respects politocracy is really not *unitary*, but *politary*. The emphasis on multiplicity is reflected in the *poli* component of *poli*-tocracy.

Politocracy gives constitutional expression to the dignity of legally competent adults. This is achieved by emphasising not individual rights primarily, but the power and authority to control the *res publicae* – the commonwealth (the public affairs communal to the members of every community) – autonomously, as individuals and also as members of different communities. Such governing power mainly concerns the so-called habitative communities, as well as much more comprehensive communities. Habitative communities may be regarded as one of the fundamental conceptions of politocracy. (This word was coined from the Latin noun *habitatio*, meaning ‘abode’ or ‘dwelling’, referring to the smallest possible communal unit to which a specific politico-constitutional significance is attributed in this context.) It is so important that it would always dominate any discussion on politocracy. Habitative communities refer to the cultural and/or local communities in which people live their daily lives. This will be explained in more detail below.

Apart from being members of habitative communities, we are also members of much larger communities and in some respects also of a global – albeit nebulous – global community. It is the aim of politocracy to obtain recognition for our shared identity as members of these larger communities and, at the same time, to account in a constitutional way for our citizenship of those communities. This entails that, in so far as public affairs which are common to all those larger communities, are concerned, we shall be joint decision-makers and joint controllers, as would be the case with habitative communities. Politocracy politicises habitative communities. It imbues habitative communities with a political character, because it affords their members an opportunity to authoritatively govern their *res publicae* in their capacity as its citizens. Instead of merely acknowledging the territorial state as a political community – serving as the foundation of citizenship and the *locus* for exercising political authority – on the basis of statism, politocracy would in fact recognise habitative communities as full-fledged political communities. This implies that members of habitative communities would be able to become citizens thereof and that habitative communities would accordingly also become the *loci* for exercising political authority.

Politocracy acknowledges and account for the individual freedoms and immunities that have progressively been produced over the last centuries as a most valuable asset. As a result of state-building

schemes, statist democracy and state-guaranteed human rights, the territorial state in important respects has become a threat to, and an encroacher upon such assets. As pointed out in chapter 6, it goes even further: Leviathan is the continual destroyer of communities. In terms of politocracy, habitative communities – especially cultural communities – are inherently good. They are virtuous *per se*. They are the lifeblood of real democratic politics. Habitative communities, accordingly, satisfy the need of people as adults to create a world of their own without being dictated to. It gives expression to a sense of personal independence, closely associated with the dignity of adults, in particular those who possess full legal capacity. However, the lifeblood and *conductio sine qua non* for all this, are habitative communities. That is the reason why the habitative community, in conjunction with individual dignity, is the cornerstone of a politocratic dispensation.

In a politocratic order there is no single centralised *locus* of government, established in terms of the demands of the territorial state and for the sake of its intact maintenance and veneration. Neither is there a mere single state-prescribed public identity in the image of the mortal god, nor an exclusive allegiance to the territorial state. Democracy has not been reduced to a massocracy (see chapter 7.4), nor has it degenerated into the injustice of precariocracy towards minorities as is often the case in a (multinational) territorial statist dispensation. Politocracy is specifically aimed at preventing that.

In a politocratic system the territorial state does not form the dominating structure of government authority. Government authority is spread out and there is a variety of public identities all enjoying legal recognition. There is a dispensation of maximal joint government. Provision is made for government authority (*kratos*), ranging from the restricted community to the most comprehensive one, i.e. government authority for and by the most habitative and local *demos*, stretching to global government for a global *demos*. In a politocratic dispensation, public political identity is of a plural nature. Public political allegiance, which at present is only owed to the state, is divided and relativised. It is primarily due to the more habitative of communities, and only thereafter to the most comprehensive political communities. Democracy has been radicalised. Governing – decision-making, including the exercise of fiscal power and the execution of decisions – in respect of habitative issues takes place on a habitative government level. It is not dictated from elsewhere. Matters of a more comprehensive nature are governed on a more comprehensive level. The few global matters that there might be, would be governed globally.

In a politocratic dispensation, citizenship, as well as the control over and the realising of all *res publicae*, would enjoy full recognition. Citizenship and *res publica* are the two central concepts of politocracy. Later in this chapter these concepts will be explained in much more detail but, due to their importance, they will now be briefly summarised.

***Res publica* (Commonwealth)**

The *res publica* is the *commonwealth*, i.e. public affairs common to the totality of the political community in question. It refers to those matters jointly controlled and governed by citizens. Politocracy presupposes a rich republicanism, meaning a comprehensive commonwealth that forms the object of politics – joint government by the citizenry.

Citizens (*politai*)

In a politocracy the citizens – the *politai* – govern the *res publica* in a democratic way. The citizenship of politocracy is not the impoverished citizenship of the territorial state, which is barely more than a mere legal status. Citizenship denotes joint government of the *res publicae*. Citizenship denotes genuinely independent and continuous participation in, and acceptance of responsibility for, the *res publicae*. Instead of being merely a passive legal status, citizenship in the politocratic sense has an infinitely richer content. It rather refers to the filling of a position (assuming the office of citizenship), in terms of which citizens would actively accept real responsibility for and control of the *res publicae*. This is the very reason for applying the Classic Greek word for citizens, namely *politai*, in this context. Two further aspects of citizenship also need to be explained now.

In the first place, politocracy prefers unanimous (consensus) government. Matter-of-fact debate and compromise, which are important elements of politocracy, must contribute to this. It is to be preferred above voting. Compromise and consensus are certainly easier attainable in habitative communities – in particular when they are homogeneous (see the discussion of habitative communities later on) and more closely knit in scope – than in the comprehensive heterogeneous territorial state. Although politocracy places a high premium on compromise and consensus, these are not indispensable to joint government. There can also be defeated opinions that are not reflected in government decisions. In the habitative community at least, it would not give rise to precariocracy, which helpless minorities are often exposed to in the territorial state.

Secondly, a distinction is drawn here between *members* and *citizens* of a community. This is an intended and important distinction, as not all members, even though they might be adults with full legal capacity, are citizens. Nevertheless, this does not make politocracy less democratic. On the contrary, it actually enhances its democratic quality by entailing the vesting of governmental authority in a politically relevant but open (accessible) category of persons – the citizens. This matter will be discussed in more detail in 10.4 below.

2.2 Explanation

2.2.1 *The central significance of communities*

In chapter 4 it was pointed out that a radical absence of genuine human community since the times of Bodin forms one of the basic premises of the statist paradigm. Accordingly, the state would hardly be more than an instrument for curbing the individual conflict of mutually hostile or at least detached individuals. The state is no *res publica* – referring to a commonwealth in which all citizens have an active equal share – but merely an aloof and potentially dangerous Leviathan who has to be tolerated as an inevitable ill, who must intervene when conflict threatens his subjects in the atomistic society. There is no civil copartnership whatsoever. As explained earlier, Rousseau was anxious to restore citizenship and re-forged the close ties between state and citizenry. This effort, however, has become dysfunctional after the French Revolution when a variety of state-building programmes aimed at re-creating citizens in the image of the state were launched with devastating consequences for specific communities.

Politocracy rejects the premise of a radical absence of genuine human community as a fundamentally erroneous interpretation of the human condition and way of life. All individual existence, identity, values and achievements are firmly anchored in communities. In the absence of communities, no individual existence would be possible. Therefore, politocracy is constructed on a communitarian basis. At the same time politocracy rejects state-building programmes because of the coercion it would bring to bear upon individuals and especially upon nonstatist cultural communities, to alter their identities, values, loyalties and political activities. From a politocratic perspective, the coercive logic of state building would be an inexcusable affront to individual freedom and dignity, as well as to the integrity of cultural, linguistic and similar non-statist communities.

A plethora of common denominators explains why people belong to different cultural, linguistic, religious, local, professional, economic and similar communities. Owing to what is usually described as modernisation, people have become more individualised. Nowadays there are many more opportunities to exercise personal choices and there is a wealth of things that may provide to personal pleasure and satisfaction. People have abandoned their traditional communal connections of tribe, village and similar parochial entities and assimilated into other communities. The accelerated globalisation over the recent decades – the rapid shifting of goods, services, capital and people – has been an enormous stimulus for a single global market. The development and refinement of the World Wide Web and Internet are constantly accelerating the merging of aspects of the economy. The stimulation of the urge to satisfy a growing number of consumer needs and the concomitant Anglicisation are strong homogenising forces, coercing people to become alike and to be consumers in a restricted sense – individuals primarily bent on *consumption*, who *work* in order to satisfy their consumer needs. No cultural or similar community has been left unaffected. These types of communities are drastically exposed to homogenising social forces. In fact, such forces, in conjunction with state-building programmes, have already brought about the disappearance and disruption of many such communities. Nevertheless, there is still no such thing as a sovereign individual, who is completely detached from all communities. Individuals have, however, become physically, socially and economically much more mobile, and their lifestyles often create the impression of a purely individual existence, detached from any community. Yet, when individuals move around, such relocation is still not totally free of any community involvement. When movement takes place, it remains movement – completely or partially – from one community to another. Although we may relocate and (partially) detach ourselves from existing communities, we still retain our association with communities. Our identities are communally determined and our views and convictions are moulded by our community involvement. Moreover, despite our mobility, under no circumstances can we live meaningfully without any involvement in community life and without communal human interaction.

What we designate as individual rights, cannot be exercised in any way other than in a group context, no matter how individual they might appear at first glance. The right to freedom of expression loses all meaning if such expression is not directed at an audience – a community – of which the person entitled to the right to free expression also belongs. Rights to religion, education, language, as well as economic rights and the like, are equally nonexistent or stripped of any fundamental meaning if such rights cannot be exercised in conjunction with other people belonging to the same

community who are keen to exercise the same rights.¹ Therefore, communities are absolutely indispensable for living a meaningful individual life. Obviously, the existence of something like a sovereign individual – a free-floating individual, acting at random – is out of the question. An individual can only *will* and *comprehend, believe* and *do* within the horizon of the community or communities in which he is present.

Political participation is likewise dependent on community association. By employing the words ‘political participation’ I am referring to the ability of making an impact – determining the content of decisions on communal public affairs – in cooperation with others (citizens, to be specific) in respect of such affairs by means of consultation. As will later be explained in 10.4 below, persons only assume the office of citizenship, and act as citizens, by actively participating and making an impact. With a few exceptions, individuals and small communities cannot make an impact on issues of global significance. In respect of global affairs they vanish into thin air as powerless and marginalised individuals. In respect of such matters they are mere individual spectators, unable to assume the powers associated with citizenship. Although individuals who (pretend to) detach themselves from all communities as a mere particle of a universal market might boldly proclaim their individual sovereignty and achievements, it is indeed an ironic sovereignty of a powerless individual spectator-like nature that lacks any public impact whatsoever. Already burdened with several restrictions, this seemingly sovereign individual would only have an impact on his own tiny private microworld. As previously explained in chapter 7, the same position obtains in the comprehensive territorial state where democracy has degenerated into massocracy. In a dispensation of this nature individuals are unable to exercise any meaningful power, or to have any impact. The periodic exercise of suffrage does not imply any political impact and is barely more than a function of the legitimacy fiction (see chapter 7.2), legitimising the exercise of authority by small elites who wield the actual control. This deficiency has gradually been acknowledged and efforts are in progress to address it by means of public involvement.² It is, however, barely conceivable that the problem could be comprehensively resolved by mechanisms of this kind.

¹ Cf K Malan ‘The deficiency of individual rights and the need for community protection’ (2008) 71 *THRHR* 415 *et seq.*

² For example sections 59(1)(a), 72(1)(a) and 118(1)(a) of the South African Constitution. For this, see the following judgments: *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) and *Matatiele Municipality v President of the RSA* 2007 (1) BCLR 47 (CC).

Minority communities in societies that are ethnically and culturally deeply divided are particularly affected in a massocratic dispensation. Although it may be true (as explained in chapter 7) that they might periodically exercise their franchise, they would never be able to exercise real power. In respect of minorities, suffrage merely functions as a legitimising fiction, justifying the positions of authority held by majority elites. It degenerates into precariocracy, in terms of which minorities are left to the mercy of politically powerful majorities (the governing majority-based elite, to be more precise). In the eyes of the *voters* belonging to minorities, their periodic participation in elections is hardly anything but a ritual by which, ironically, they are celebrating their own precariotic powerlessness as if it is a true democracy. Modern constitutional law and international law are of course becoming increasingly aware of this problem and, as explained in chapter 9, are trying to address it by recognising minority rights. Such efforts are praiseworthy, albeit not always successful, in particular due to the fact that they are continuously being frustrated by state-building programmes. Besides, this occurs within the framework of the statist paradigm and with a view to maintaining the status quo of the statist order. Furthermore, it merely grants rights, instead of empowering communities with real authority, as is envisaged by politocracy.

The argument is also sometimes raised that minority interests could be effectively protected by an independent judiciary which adjudicates and enforces individual rights. This only holds true to a minimal extent. For the rest, such argument is ill-advised and unconvincing. It completely fails to grasp the restrictions of the judiciary in respect of issues related to politics. In spite of being independent and impartial in constitutional terms, the judiciary does not represent a political trend that is detached and independent from the reigning political elite. In fact, the judiciary is part and parcel of the same governing elite and shares its assumptions and aims. The courts interpret the law, the constitution and individual rights according to the assumptions adopted by the governing elite to which they belong. This is a general truism in respect of all judiciaries. Although courts may effect minor adjustments to the procedures adopted by the legislative and executive branches of government, they are unable and unwilling to frustrate the intentions and aspirations of the reigning elite. It is therefore unrealistic nonsense to pretend that a judiciary might regard the interests of minorities, not belonging to the governing elite, as paramount and that it might frustrate the political projects of the reigning elite in favour of minorities.³ In addition, the judiciary's *inability* to do so can be

³ On this, see K Malan 'The unity of powers and the dependence of the judiciary' (2006) 39 *De Jure* 149 *et seq* and especially the opinions expressed by R Dahl, referred to in this article.

ascribed to the fact that it is forced to depend on the executive authority for the execution of court orders. It simply cannot antagonise the legislative and executive authorities and for that very reason it is continuously forced to exercise judicial restraint. This is a general trait of judiciaries.

2.2.2 *Pluralistic public identities and spheres of government*

This state of affairs does not in any way entail a final farewell to citizenship. It is indeed possible to participate in politics – and to do so in a meaningful way – and to assume the office of citizenship. It is possible to do so in communities of restricted geographic and demographic scope, in which there are mutual ties of a cultural or similar nature among people, namely in habitative communities. It is indeed possible, because in such communities individuals can truly be heard and make an impact, and in doing so genuinely participate in governing the habitative communities in which they live. It is there, and usually only there, that people are able to fully exercise their citizenship in practical terms. For that very reason the habitative level – and no other level – is the true level for the establishment of government. Decisions should be taken and executed at that level and the fiscal ability to bring this about should also be vested there.

Generally speaking, there could be three kinds of habitative communities.

In the first place, a community may simultaneously be both local and cultural, i.e. a homogeneous cultural community, which is concentrated in the same location. That would be a *local cultural community*. This is the community with the most encompassing commonwealth that may be controlled and governed, reflecting the most comprehensive mutual ties among its citizens (the richest *res publicae*).

Secondly, a habitative community may be a *local community* in which a culturally heterogeneous community, sharing the same territory, is closely connected by means of other (local) ties, despite their cultural heterogeneity.

Thirdly, a habitative community may be a culturally homogeneous community, differing from the first type in that it is not concentrated in one place, but where its members share close cultural ties in spite of the fact that they are not congregated in one location. That would be a *translocal cultural community*.

Irrespective of the nature of the habitative community, politocracy aims to award maximal self-government to all of these communities. Each of these habitative communities controls its own

type of *res publicae* — public affairs common to the citizenry of the community concerned — which is jointly shared by all the citizens of such community. In the following discussion of the *res publicae* and citizenship, all three of these habitative communities will be kept in mind, although more emphasis will be placed on the first kind.

We do not, however, only belong to habitative communities, but are also members of many other, and more comprehensive, communities — geographical, demographical and cultural. These kinds of communities are bound by ties of communal public interests and issues, differing from the ties that connect habitative communities. In conformity with their specific nature, the more encompassing communities have their own *res publicae*. The matters (*res publicae*) that forge together such more comprehensive (subcontinental and similar) communities, may concern the combating of contagious diseases, water supply, pollution, economic interest, cyber crime or any other comprehensive issue. In the final instance there is also the global community, for there are indeed issues of a global nature that cannot be addressed purely on the habitative level. In fact, for a considerable period of time already, we have not only been copartners of our immediate cultural communities, but also of a global culture. Literature and science had already brought this about a long time ago, and more recently, globalisation has prominently emphasised this reality. In addition, there is a deep human need to be acknowledged and respected as a member of humanity as such. Our public identity should be determined by the fact that we are simultaneously members of all of these communities and, depending on the kind of issue involved, government authority — the power to take binding decisions and execute them — should be vested at all of these levels.

There are matters that may be denoted as typically habitative, regional, subcontinental or global issues. In other words, there are various typically habitative, regional, subcontinental, or global *res publicae*. However, there are also many matters of simultaneous importance in more than one of these domains. It will often have to be determined at which level of government the relevant issue has to be addressed. Joint government at various levels will in many cases be indispensable. The crux of the matter is that there is no single sovereign government. There is plainly no single sovereign statist government that the statist paradigm (in its most unaccommodating form) could claim for itself.

2.2.3 *Subsidiarity and Correction*

From a politocratic perspective there are two principles that regulate the allocation of government authority. First, there is the principle of

subsidiarity and secondly, the principle of correction. Subsidiarity and self-government are closely related and mutually implicative. Subsidiarity (which implies self-government) will first be discussed and a discussion of self-government will follow later.

Subsidiarity

According to the principle of subsidiarity, government should be as habitative as possible. Government functions must therefore be exercised at the most habitative level, as close as possible to those affected by the exercise of such functions. This does not only apply to government functions that are usually associated with local or provincial government, but in principle to all other functions. Government which is distant from habitative communities, exercised by seats of government other than the government of the habitative community in question, may not interfere in the affairs of habitative governments.

- If a habitative community is a local cultural community (the first kind described above) and therefore a homogeneous cultural community concentrated in a specific location, maximal government should take place at that level. In this case the *locus* of government would be determined by both domicile and personality (in the sense of a person's cultural identity).
- If a habitative community is a local community (the second kind described above) and therefore a culturally heterogeneous community intending to exercise government functions in the same *territorium*, these functions should clearly be exercised at such level. In this case the *locus* of government would be determined by domicile. However, as will be evident from the discussion of the third kind of habitative community immediately below, the matters in respect of which this second kind of community (local habitative community) may govern, would be restricted to the *res publicae* of the local community concerned. Although it would therefore concern matters that are genuinely common to such a community, it would not include the affairs of translocal habitative communities. The latter would obviously not be included in the *res publicae* of the local community.
- Thirdly, there is the translocal habitative cultural community. It is a habitative, culturally close-knit, homogeneous community that is not locally concentrated. Government functions in and for such a community should be exercised by the community itself. Like the government functions of local habitative communities, the functions of translocal habitative communities would also be restricted to the *res publicae* of this community, namely to matters pertaining to the cultural well-being of this community. Members of such a community would therefore be living in various

heterogeneous local communities. According to the politocratic view, each of these local communities would have maximal self-government, except in terms of the affairs of the close-knit but geographically extended cultural communities (translocal cultural communities) living in various local communities. In such local communities the *locus* of government would be determined by domicile, as well as personality. The domicile principle would determine the *locus* of government in respect of matters that are common to such local community. Conversely, the personality principle would determine the *locus* of government in respect of matters that are particular to the persons (members) concerned, who form part of the relevant translocal cultural community.

None of these habitative forms of government – not even the first one (the local cultural community and government) – would be a continuation of the present territorial state. It would also not be a continuation of the territorial state in a culturally homogeneous form. Two reasons might be advanced in support of this view.

The first lies in the fact that none of the political communities concerned would be sovereign. They would not be microsovereign territorial states, because several matters (*res publicae*) lie beyond their jurisdiction and are managed by more comprehensive political units, of which the habitative political units form part. Accordingly, politocracy does not envisage the continuation of a sovereign territorial state, either in its present form or in the form of a number of microsovereign states. It would rather be in the nature of a loose federation in which government functions are divided among various communities in accordance with the kind of *res publicae* that match the respective communities – ranging from habitative to more comprehensive communities.

Secondly, habitative communities (and governments) would be geographically and demographically too small to be true territorial (or national) states. Politocracy envisages a rich commonwealth to be governed. Furthermore, citizenship from a politocratic perspective would entail real management of governmental functions by the citizenry in question, which is hardly possible in a comprehensive territorial state. The restricted scope of habitative communities (and governments) is fundamental to a politicratical dispensation, for as soon as it would become too large, politocracy would certainly founder. For that reason it cannot be reconciled with the territorial state. Its scope, especially in respect of the number of inhabitants (members) and citizens, as well as to its geographical ambit, would thus be one of politocracy's critical issues. These issues will be addressed at the end of this chapter.

Should habitative communities find it difficult to exercise a government function, more detached governments would not *ipso facto* assume such functions. On the contrary, the first responsibility of a more detached government, in terms of the principle of subsidiarity, would be to assist in accomplishing a situation where the relevant function could be performed by the most habitative government. Only when it would clearly be impossible for a more habitative government to exercise a function, would it be performed by a government that is capable of doing so. The guiding principle would be that government functions should if at all possible be exercised at the most habitative level. Politocracy views the habitative level as the most natural *locus* – the point of departure and default position – of government authority. It would vest there, unless and until it becomes imperative that the relevant authority be ‘handed up’. In principle, such handing-up would be a temporary measure: government authority would remain with the more detached level of government only in so far as and only for as long as it might be necessary. The function shall as soon as possible be reverted to government of the habitative community.

The interpretation of the subsidiarity principle suggested here differs markedly from the method according to which government functions are normally allocated to federal units, municipalities, provinces and states, in terms of the constitutional arrangements obtaining in modern territorial states. All the units on a specific level would normally have the self-same powers. On the one hand, all provinces are vested with the same governmental powers, whilst the powers of all municipal governments are also identical. According to the subsidiarity principle as applied here, matters would be totally different, because a habitative government would be authorised to exercise maximal governmental functions, including the kind of functions usually associated with national government. The only condition would be that the government concerned should in fact be able to accomplish it. It is in this very respect that habitative communities and governments differ from local (municipal) governments, in terms of stereotypical constitutional arrangements. Whereas local governmental functions are inherently restricted, those of habitative governments, albeit locally based, would not be subject to similar restrictions.

Subsidiarity and self-government are closely associated, implying that people should be able to decide autonomously on all public matters affecting them. Self-government, in turn, is closely associated with the principle of human dignity. Dignified conduct requires that adults with full legal capacity should in principle not be subjected to the dictates of others. Coercion and dictates, which restrict people’s capacity to determine their own affairs, constitute an injurious objectification of the persons concerned. This could be

prevented if people had the power to determine their own affairs. Basic dignity, self-government and subsidiarity are thus three closely associated and mutually complementing principles.

Correction

Habitative government can go wrong, like any other form of government. For example, government might solely promote the interests of certain people, instead of the interests of the broad habitative community, or a habitative government might abuse its authority to the detriment of a sector of the habitative community concerned. It is quite possible for habitative government to degenerate into reclusiveness and an excess of parochialism or sectarianism, potentially choking the habitative community in moralistic insularity, religious fundamentalism, or similar totalitarianism. Parochialism and reclusiveness are no strange phenomena. Within bounds they need not even be an evil. In fact, there are highly modernised and comprehensive communities that distinguish themselves from other communities in their uniqueness, peculiarity and over-simplified views. These kinds of matters are indeed the forces behind the formation, demarcation and characterisation of communities. Parochialism as such affords no difficulty, but problems could arise when parochialism leads to the palpable harming and oppression of people within the relevant community, or where it deteriorates into a real danger to other communities. In this context, *correction* would become relevant.

As sovereignty in terms of a politocratic approach would not exclusively vest in one place – not even in a habitative government – it would be possible for a habitative government to be corrected from the outside. Furthermore, habitative communities and governments, forming part of and interacting with regional and subcontinental communities and with the global community, could also be guided and corrected, thus preventing habitative communities from degrading into chauvinism, self-righteousness and the oppression of their own communities. Something of this kind has already been in existence, as a result of the development of international and regional human-rights standards since the Second World War. This standardisation does in fact endeavour to gain such corrective influence and has even been partly successful in this respect.

Subsidiarity and self-government are of course potentially contradictory to *correction*. Correction entails that certain decisions that are easily taken and executed on a habitative level would nevertheless be forbidden, because of its potential to curtail individual immunity and freedom, thereby causing to a possible totalitarian encroachment on the private affairs of individuals. On the

other hand, the private aspirations of individuals might not be so inordinate as to fetter government authority from protecting the integrity of the habitative community. There is no ready-made formula in terms of which such tension could be resolved. It is simply something that has to be decided by the application of good political judgment. There are, however, three resources that might be considered applicable to maintaining the required equilibrium.

The first resource is that of political decision-making – including decision-making by habitative governments – which must take place continuously by means of a transparent decision-making process. If specific individuals stand to be particularly affected by the decision, their views should be taken into consideration in the decision-making process. This requirement is in accordance with the rule of natural justice known as '*audi alteram partem*'.

The second extends the other principle of natural justice, namely '*nemo iudex in sua causa*', which usually applies only to judicial and administrative decisions, to the field of political decision-making. In terms of this principle, political decisions taken by dominant political decision-makers, in furtherance of their own political interests, would be forbidden.

Thirdly, a jurisdictional presumption should be operative for the benefit of the authorities of habitative governments, aimed at protecting the integrity of habitative communities. This would be imperative to protect habitative communities from the homogenising pressure of overpowering capital intensive market forces and the homogenising impact of the international electronic media in particular.

As mentioned before habitative communities and governments are the cornerstones of politocracy. Against this background, the key concept of *res publica* and then of the *polites* (citizen) will be explained from a politocratic perspective. The *res publicae* and the *politai* are mutually so closely associated that in reality they imply one another. They form part of a single logical totality. Notwithstanding the fact that the two concepts are considered separately, they remain mutually reliant. There is a close coherence between these concepts and the problem concerning the suitable scope of the habitative community, for either a too large or a too small habitative community would be uncongenial to a lively *res publica* and would stifle the exercise of citizenship. The scope or size of the habitative community is therefore of cardinal importance. It will form the subject of our final discussion.

3 *Res publica*/Commonwealth

3.1 Characteristics of a *res publica*⁴

In terms of the politocratic approach that was sketched until now, there would be a variety of communities: from the most habitative to the most encompassing global community. Each would have its own *res publicae*. There are few matters that are truly communal to all people. For that reason the global community is the flimsiest – the vaguest and most imagined, as it were – community. Nevertheless, there are some communal issues that affect everyone, even though these may only occur sporadically, or may be of a more abstract nature. In so far as there might be such issues, a global community would indeed be a reality. In the following discussion, however, the emphasis is mainly on the *res publicae* of habitative communities, because this would be the basis of a politocratic order which would only come into its own in habitative communities and governments, where dignified democratic politics and the exercise of citizenship could reach their full potential.

The *res publicae* comprise the commonwealth – public affairs of general importance to all citizens. It is the commonwealth of matters that form the subject of politics – in respect of which citizens take political decisions and govern. There is therefore a logical tie existing between the *res publicae* and the citizen, because citizenship is exercised with regard to the *res publicae*. Without any *res publicae* there would be nothing that can be jointly governed and controlled. Without it, everything would be private and citizenship, which is actually dependent on the existence of a commonwealth, would be non-existent. From a politocratic perspective, the active participation by citizens (*politai*) in, and their control of the *res publicae* would be regarded as inherently virtuous. It would enable people in a dignified way to effectively control the public affairs in respect of which they share a common interest, instead of being reduced, in an inherently undignified fashion by dictates of others to mere objects, or of being mere spectators of the fate of affairs collectively affecting them. Furthermore, the joint participation of citizens in governing the commonwealth would be inherently virtuous, because it would enable people to move away from their private domains. By participating in government, citizens would be enabled to mutually justify themselves in a rational way regarding the communal *res publicae*, to receive an input from their cocitizens and

⁴ The concept of *res publica*, originating in Roman property law, will henceforth be extensively employed. Although there are similarities, it will not convey the same meaning it carries in property law. *Res publica* in the context of 'republican' has always had a somewhat different meaning than it does in property law.

to be influenced by them and, simultaneously, to be heard and exert an influence – to have an impact. Such a republican mode of conduct would, according to a politocratic point of view, be virtuous *per se*.

One can, however, barely envisage a *res publica* in a geographically vast and abundantly populated territorial state; therefore, genuine citizenship, which cannot be established without proper *res publicae*, is hardly attainable in the territorial state. This occurs specifically when the population of the territorial state is highly heterogeneous. In such an expansive dispensation, the state is simply too far removed from the population and the population itself is too numerous and often too heterogeneous, causing a dearth of truly communal public affairs, experienced as such. Stated differently, one might simply declare that no meaningful *res publicae* are in existence. In the absence of such commonwealth, there is no possibility at all of real citizenship and people are reduced to mere individuals who concern themselves with private affairs. In so far as a commonwealth does indeed exist, it would be a mere abstraction. A real set of *res publicae* could only be present when the political community would be geographically and demographically considerably more restricted – and closely knit. Then only would the possibility arise for individuals to assume the office of citizenship and jointly control their *res publicae* in cooperation with their cocitizens. Thus, before there could be genuine *res publicae*, there would have to be a real human community. To enable the establishment of a habitative community and government, a minimum degree of homogeneity and mutual human involvement would be required. The *res publicae* would reflect a real community in which politics – free participation in the public affairs of the commonwealth, i.e. the free exercise of actual citizenship – might flourish.

The close-knit communities have the most comprehensive *res publicae* at their disposal. For that reason habitative communities would have a more comprehensive commonwealth at their disposal than more comprehensive communities; and for that reason habitative communities of the first kind described earlier, namely habitative homogeneous cultural communities concentrated in the same location, would have the most comprehensive *res publicae*, as well as the most comprehensive opportunities for citizenship at their disposal.

The characteristics of the *res publicae* are as follows:

- Unlike private property, a *res publica* cannot vest in individuals, to the exclusion of other individuals. Therefore, it is not susceptible to exclusive individual control. It presupposes joint and common interests in it and control of it, in cooperation with others that have an equal or similar interest. One cannot dispose

of it as one may dispose of assets *in commercio* (in commercial traffic); and the private law phenomena of (individual) ownership, burdening or alienation of assets according to the free will of the individual holder of the right, are alien to *res publicae*. *Res publicae* usually endure longer than the lifespan of the individual. One can say that an individual is born within it, as it were, and that he usually leaves it behind – albeit in a possibly somewhat altered form – when he dies.

- *Res publicae* are based on the perpetual premise of a shared interest with others. The notion of *res publicae* without others also sharing in it, can simply not be entertained. It could never be conceived without others having an interest in the same *res publicae*. Decisions affecting the *res publicae* always ripple out to everybody sharing an interest in the *res publicae*. Just as impossible as it would be for the *res publicae* to vest in a single person, its fortunes and misfortunes would also never be restricted to individuals. If someone were to derive a benefit from it, it would imply a simultaneous benefit to someone else, and should someone suffer harm in consequence of an infringement of the commonwealth, harm would automatically be suffered by the other citizens. Since the *res publicae* will always exist as common interests, never susceptible to vesting exclusively in a single person, control of it will necessarily always reveal all other persons (citizens) who share an interest in the *res publicae*. Dealing with the affairs of the commonwealth would therefore always be based on the assumption that there is a constant interaction among all citizens in respect of commonwealth affairs. The *res publicae* would therefore always imply that people, in their capacity as citizens, will be mutually dependent. For that reason, everything held (shared) as *res publicae*, would also be the cement of (civil) society. Even though citizens might have differences of opinion in respect of the *res publicae* and might argue about it, the *res publicae* would, in the final analysis, jointly be held by all citizens and therefore it should be regarded as the true foundation of a real community.⁵

So, what would the commonwealth – the *res publicae* – of the habitative community then be? One could formulate the question differently: Which matters and which assets would be the component parts of the commonwealth of the citizens of such habitative

⁵ On this, see Malan (n 1 above), as well as M Berent 'Collective rights and the Ancient Community' (1991) IV *Canadian Journal of Law and Jurisprudence* 394.

community — the public affairs shared by citizens and jointly controlled by them?⁶

3.2 The *res* of the (*res*) *publicae*

In the comprehensive territorial state governed on a liberal basis, the *res publicae* might become depleted, as so many matters have been transferred to the private sphere, thereby removing them from the domain of political decision-making. On the other hand, matters that are actually individual and intimate in nature and therefore rightly belong to the private domain, might erroneously be classified as *res publicae*. That would open the door to a totalitarian state in which government encroachment might restrict individual freedom and social interaction through improper dictates. From a politocratic perspective, the gains derived from individual freedom in the modern era are precious and any totalitarian encroachment would therefore be condemnable. To prevent this from happening, matters that are of a fundamentally private nature may not be regarded as *res publicae* under any circumstances.

A large number of genuinely general public matters are conceivable.⁷ What follows is not a catalogue of *res publicae*, but a mere discussion of the most fundamental *res publicae*, namely language, *patria*, community and public institutions. Those are the *res publicae* without which citizenship and a political life would be impossible.

Language

Language is an important marker of individual identity. This is the way in which many people have experienced it and are still experiencing it. It is also the common means that enable citizens to exercise joint control over the *res publicae*. Without a common language, citizens would find it impossible to have any interaction and to take care of the *res publicae*. A common language is therefore the basis of all

⁶ Clarity on the *res* of *res publicae* is to be found in a distinction drawn between things susceptible of private ownership (*res in commercio*) in contrast with things incapable of being owned (*res extra commercium*), of which *res publicae* form a part. Individuals engaging in economic activity stand in a relationship vis-à-vis *res in commercio*, whereas citizens (*politai*) are, in turn, engaged in a relationship with the *res publicae*. An innovative reinterpretation and extension of the concept of *res publicae* is of critical importance to the politocratic dispensation. The concept of *res publicae*, signifying interests incapable of being owned in terms of the Roman classification, is important because it provides the tools for developing assets (*res* in the broadest possible sense of the word), free from the disciplines of economic categories.

⁷ The flaw of certain modern trends of thought calling themselves 'republican', lies in the fact that such notions fail to recognise the conception of *res publicae*.

other *res publicae*. Without a common language, all other *res publicae* would be inconceivable and practically nonexistent, for it would then be impossible to control such *res publicae* in accordance with the joint reign. A shared language is therefore not only one of the most important *res publicae*, but simultaneously an indispensable precondition for the meaningful existence of all other *res publicae*. If a person is not a member of the language community, he would simply be unable to participate in controlling any of the (other) *res publicae* and to fulfil his role as citizen. There might be multilingual habitative (and other) communities and multilingual governments. However, government in a multilingual dispensation would be dependent on facilities that enable all citizens regardless of linguistic diversity, to be full-fledged and equal participants in a political discourse on joint government of the commonwealth. In so far as the discourse on control of the *res publicae* might be conducted in a language or languages in which not everybody is conversant, those unable to understand it would be excluded from citizenship, because they would be unable to exercise joint control. In identical fashion, everyone in a multilingual dispensation would have to be capable of participating in the political discourse and joint government, without being hampered by any inhibitions resulting from a deficient language proficiency in the language that is not his mother tongue.

Some people may be of a more timid and reserved nature, or they might simply not be interested in getting involved in governing the *res publicae*. For these reasons they would feel inhibited to participate in the political decision-making process, or they would simply refrain from such participation voluntarily. If that were indeed to occur, their exclusion from the political process would in fact be the result of their own personal temperament, personality traits or free will, and could not be blamed on any precarious constitutional arrangement. However, should oppression and the inhibiting of participation in joint government – i.e. the inability to assume the office of citizen – arise from a constitutional arrangement in respect of language, allowing some to participate, but restricting or preventing others from doing so, such a state of affairs would have to be blamed on the inequitable constitutional arrangement in question. Such arrangement would provide part of the population with language as a basic *res publica*, whilst excluding others from it; those whose mother tongue is used in the political decision-making process would be citizens to a greater or larger extent, but all others would be excluded from the office of citizenship; it would establish factional rule for those conversant with and preferring the relevant language over and to the detriment of those who do not prefer it, or are not fully conversant with it. Such constitutional arrangement would obviously be inequitable and undemocratic. The fact that such constitutional linguistic arrangement would also infringe on the basic dignity of those who are marginalised by it, would make it even more despicable, for it would

degrade them to the status of persons without full legal capacity; as if they were mere children, it would be left to others to decide on their own affairs.

The most extreme statist answer to a multilingual situation was discussed in chapter 6. In pursuance of a programme of state building one language is selected as the preferred language of the state, harnessed to impose a statist identity in the image and sound of the mortal god. Accordingly, people will have to abandon their own language and similar particular characteristics and values in order to be assimilated into a statist identity in accordance with the dominant forces within the territorial state. From a politocratic perspective, this would be an inexcusable slight of personal identity in favour of the state. Viewed from a politocratic angle, the *res publicae* would have to be constructed in conformity with the variety of characteristics of the population, and not according to the interests of the territorial state. Accordingly, the language of every linguistic community would be regarded as equal in value and every language would qualify as a fundamental *res publica* of the community in question, and therefore as a language serving as medium of government over the commonwealth of the relevant community.

From a politocratic perspective, a language of restricted scope would pose no stumbling block in the exercise of one's citizenship and joint government of the *res publicae*. On the contrary, it would be the means that enable one to exercise your citizenship and to participate in genuine joint government. This would be even more possible within the confined ambit of a habitative community. As already explained, it is precisely in the context of habitative communities and governments that people might have an impact, in other words could become part of joint government in their capacity as citizens by cooperating and interacting with other citizens. For the very reason that this would happen in the habitative context, citizenship and joint government would be all the more attainable in the (mother) tongue of the community in question. Consequently, a more comprehensive or global language would not be necessary at all. By using their own communally-confined mother tongue, without any inhibitions and without being marginalised, people would be capable of having an impact on the political discourse – to be citizens and therefore able to participate in joint government.

The treatment of language as one of the basic *res publicae* would differ, in accordance with the kind of habitative community that presents itself. In respect of the first and third kinds of habitative communities discussed earlier (local cultural communities and trans-local cultural communities), only one language would be applicable as a *res publica*, because of the cultural homogeneity of such communities. In respect of all other communal public affairs of the

communities concerned, the single relevant language might thus be applied as the obvious medium for managing the affairs of the community in question.

In respect of the second kind of habitative community, namely local culturally heterogeneous, albeit close-knit communities, there would indeed be linguistic heterogeneity (a multilingual situation). In this case language would of course remain a *res publica*, provided that it would be a variety of languages instead of a single language. In these kinds of communities, facilities should be made available to enable citizens of such communities to use their languages of choice in managing the public affairs of the local community concerned.

***Patria* (and other common values related to land)**

Approached from an economic perspective, land is a production factor, because it consists of demarcated units forming the basis of production, industry, commerce and habitation. By its nature it is susceptible to private property, encumbrance and alienation, and any similar means of disposal in terms of private-law principles. This, however, is not the only view and function of land. Land is also the common physical, psychological (and symbolic) asset of a community. Land is the country, the *patria*⁸ of a community in its entirety. It is the territory/city/region where a specific habitative (or more encompassing) community resides. Depending on the nature of the habitative community concerned, the *patria* will display certain cultural traits. In the case of the first kind of habitative community, where a culturally homogeneous community is concentrated in a specific location, that location will indeed be the *patria*, at the same time also displaying the homogeneous cultural traits of the community living there. In respect of the second kind of community – the close-knit culturally heterogeneous local community concentrated in one location – the inhabitants of the *patria* will naturally display heterogeneous cultural characteristics.⁹

The *patria* is the collective commonwealth of all its citizens. It is the collective public asset of all citizens of the community concerned and jointly governed by all of them. Accordingly, the citizens are able to guard its physical integrity. Where local communities have a specific cultural nature and are thus inhabited by people of a specific culture (the first and second kinds of habitative communities), it would fall within the political powers of the government concerned to

⁸ Two alternatives for this are 'fatherland' and 'heimat'. *Patria* has been preferred above, as it accords best with the restricted scope of the habitative community of politocracy.

⁹ The third kind of community, which is not connected to a specific location, obviously lacks the *res publica* of *patria*.

maintain the cultural character of the relevant local community by controlling immigration. A necessary implication is that an individual's power to dispose of land (in the private-law sense) could be restricted. This could mean that any disposal of land or any change in the pattern of habitation of land which may disrupt the cultural character of the habitative community which forms part of the *res publicae* of such a community could be prohibited.

From a politocratic perspective, land as a private-law economic asset susceptible to commercial disposal (by its owners), should be brought into equilibrium with land as a part of the common *patria*. In terms of private law, land can be divided and allocated to different title holders. From a politocratic perspective, however, land would be an indivisible part of the common *patria*; it would not vest in private title holders but in the community as a whole. From a private-law angle, land is *res in commercio* and therefore marketable but from a politocratic perspective, it would be regarded as *res publica*, implying that it falls beyond the sphere of commercial traffic – it would be *res extra commercium* and therefore unmarketable.¹⁰

In at least two further respects, land belongs to the collective *res publicae* of the community – the one ecologic and the other economic. In the first place, it forms part of the physical environment, which necessarily has to be clean and healthy to create the possibility of a healthy and meaningful existence. Secondly, the totality of land inhabited by a community is also the common asset (*res publica*), on the basis of which the community must ensure its economic well-being. This does not in the least imply that individual landowners might be denied their proprietary rights. Not in the least. What it does mean, however, is that although it could be held as divisible units by individual owners, it would also exist in its totality as a *res publica* of an economic nature, for the benefit of an entire community. In both respects where land is regarded as *res publica* – ecologic and economic – the community as a whole would have a governing stake in land. In those respects the control of land as commonwealth would fall within the sphere of authority of the government concerned. Governments would therefore be empowered to control the ecologic and economic conservation of land to the advantage of the community as a whole. This in turn, would imply restrictions on the individual property rights of the applicable owner to dispose of his land. He would not, for example, be entitled to leave the land unused, since that would deprive the community of the economic advantage (in terms of food production, etc) of such land. Nor would he in an ecological sense be entitled to abuse the land in a

¹⁰ This distinction is naturally not unknown in law. In fact, it is also associated with a stereotypical distinction in respect of land, according to which the government reigns over the national territory, without owning it.

way that would pose any health or related hazard to the broader community. The rules applicable to individual owners would naturally also be applicable to corporate land owners.

Community

In 2.2.1 above the significance of communities for a politocratic dispensation has already been explained. The conception of communities is extremely comprehensive, being characterised by cultural, historical, social and economic traits. Communities are the source of individual identities, values, physical and psychological security, a meaningful social, economic and cultural life, the exercise of individual rights and political participation by means of which individuals, as citizens, may determine their common well-being. 'Community' also encompasses tradition – the collective wisdom and experience of both the present and former generations, which we benefit from.

Since communities are so essential in our everyday lives, it stands to reason that the communities to which we belong should be regarded as a prime *res publica*. The community is collectively guarded and jointly controlled and governed. Members of a community, collectively belonging to and constituting such community, are of mutual importance to one another, as the preservation and well-being of the community as a whole would depend on it.

This emphasis on the community as a fundamental *res publica* in terms of the politocratic point of view, would do away with the premise of the statist order, according to which the state is to be primarily regarded as a mere territorial arrangement in terms of a common legal order that affects *any number of men* (see chapters 4 and 5). This statist approach fails to appreciate community as a cornerstone and precondition of the public order. On the basis of the common interests of a community of people, among whom there is genuine communal ties, politocracy links up with Aristotle who regarded a real community as fundamentally conditional to the existence of the *polis*. To Aristotle's mind the *polis* was '... a community of like persons whose end or aim is the best life possible'.¹¹ In a qualitative sense the *polis* would therefore be the antithesis of a mutual protection pact or commercial agreement among those who (fortuitously) inhabit the same place, and where the government merely facilitates commerce, prohibiting inhabitants

¹¹ Aristotle (1962) *The politics* (Translated from the Greek by TA Sinclair) Book VII, chapter 8 271.

from wrongful actions against one another, and regulating mutual conflict.¹²

One of the distinctive traits of modern communities is that they facilitate specialisation par excellence, which enables people to develop their specific abilities to the utmost extent. As a result of specialisation, individual community members live in a network of interdependence in which each mutually benefits from the specialisation of all others. This community dispensation enables each and everyone to maximise his individual talents, skills and accomplishments. Not only does it benefit the hard-working, specialising individuals, but also the communities to which everyone belong. These benefits include economic welfare, which necessarily arises from the optimal performance of diligent specialising individuals.

Successful specialisation by the outstanding individual creates the impression of an apparently sovereign individual who performs all by himself. Obviously an individual can hardly perform properly without personal diligence, talent and energy. Furthermore, other individuals – the community or communities that the individual achievers belong to – derive great benefit from such accomplishments. One can therefore truly celebrate the accomplishments of those who perform well. Such accomplishments, however, will never be purely individual. On the contrary, they are in fact partially due to the community or communities to which successful individuals belong.

In the first place, communities are the suppliers – through institutions and other community members – of education, training, examples, facilities and standards of performance. In doing so, it paves the way for potential individual achievers. It places individuals in a position to accomplish something that would otherwise have remained latent.

Secondly, specialisation enables people to concentrate their energies on those aspects in which they have the ability to deliver their maximal performance. Without specialisation, individuals would have to waste their energy on their basic survival and on matters for which they have no special talent. This would reduce their specific abilities to perpetual *potential* abilities that would be difficult to manifest. Specialisation is therefore liberating. It liberates individuals to discover, hone and give free rein to their potential – to perform to the utmost of their abilities, receive recognition for it and thus find happiness. This is preeminently the product of a community in which tasks, engagements and economic activities can be distributed in

¹² Aristotle (n 11 above) Book III, chapter 9 119-120.

minute detail — in other words, a differentiated, prosperous community which, as a common *res publica*, facilitates individual performance. The community in which (interdependent) individuals, as a result of specialisation, enjoy the freedom of performing according to their chosen occupations, professions or trades furthermore prompts the question concerning the ideal scope of habitative communities, on which we shall shed light at the end of this discussion of politocracy.

Beyond such a community context, specialisation would be impossible. The individual achiever may therefore basically ascribe his achievements to his close connection to his community or communities. In addition to his personal exertions, these connections may also be regarded as the source of his achievements. The truth of the matter is that the communities to which we belong and the people who form part of these communities are in fact the indispensable common asset of all of us — one of the most precious *res publicae*, without which no meaningful life and individual achievement would be possible.

A community is therefore also the pool of the great variety of constructive skills, talents, diligence, trades, professional and commercial activities and the like, reflected in the collected aggregate of all individual community members. This wealth of skills and activities enables individuals to satisfy their needs and to specialise at the same time. Therefore, each individual member of a community has the other members — the community as a whole — to thank for his ability of satisfying his needs, as well as for his achievements. They are therefore reliant on each other's economic activities and dependent on the mutual assistance engendered by diverging economic activities. This vision of community emphasises the short-sightedness of convictions in respect of individual inequality and class stratification, according to which others are scorned for their involvement with purportedly lesser economic activities (for example, purported inferior handicraft and physical labour), for it is in fact due to the network of all interdependent constructive economic activities that each individual activity — and achievement — could materialise. A realistic vision of the operation of a community with its concomitant specialisation emphasises the fact that equal respect should be due to all constructive activities, as each and every activity is indispensable for maintaining the rest, as well as the community at large. Instead of creating an order of preference, emphasis should rather be placed on the fact that every constructive activity ought to be executed as well and as proficient as possible. Consequently, recognition would not only be bestowed on every individual, but at the same time the general well-being of the community would be promoted.

Accordingly, every individual person has a crucial stake in maintaining the greatest possible and most diverse wealth of skills and activities in which others are involved. Individuals have a common concern to ensure that the skills and good qualities of every other individual should be realised to the utmost, as that would be to everybody's advantage. The good qualities and achievements of a specific individual can therefore never exclusively be attributed and ascribed to the individual concerned. Such an individual will never be the exclusive individual author of his achievement; neither will he be its exclusive beneficiary. The (specialised) community can be regarded in part as the collective author of such achievements as well as their beneficiary. (Equal mutual respect is an additional fundamental trait of citizenship and will later be discussed in more detail under the heading of *politai*.)

Public institutions, facilities and processes

Communities can only function optimally by means of public institutions, facilities and agreed procedures. There is an enormous number of institutions and facilities of this nature: schools, universities and colleges, institutions of (democratic) public (political and economic) decision-making and execution of decisions, courts and similar institutions and processes for dispute resolution, police services, roads and similar connecting routes, libraries, theatres, public media, public squares for social gatherings, institutions supplying public services, medical and social institutions and many more. These institutions, facilities and processes are common assets belonging to everybody – all members of the community or communities that participate in and benefit from them. These are the stabilising instruments of communities, which enable their members to enjoy a meaningful and happy life. They are public assets of general concern to everybody. They could never exist exclusively for the benefit of any single person, or be utilised by a single individual to the exclusion of all others. Such institutions, facilities and processes are public assets. When they have been damaged and do not function properly, that would be to everyone's detriment and when they are healthy and functioning smoothly, that would be to everybody's benefit. Some of them, for example the legislative, executive and judicial institutions, are full-blooded *res publicae*, i.e. public undertakings in which private initiative has no part. However, there are also those that are indeed private institutions, but at the same time are shared *res publicae*. These are institutions that supply public services and serve the broader community, although they are the products of private initiative. The integrity of the private initiative which founded and has supported such institutions is, as pointed out earlier, deserving of protection, for they are after all the products of a well-functioning, specialised community, as pointed out

earlier. The community as a whole has an interest in such institutions. Although the community naturally has no full decision-making powers in respect of these institutions, it at least has a joint say in respect of their well-being.

The discussion of the *res publicae* above obviously renders no full exposition of the totality of the commonwealth. Furthermore, we have focused primarily on the commonwealth of the habitative community which, as pointed out, is not the only kind of community. The focus will now be turned on the *politai*. Who then are those who have to decide on the *res publicae*? They are, of course, the citizens – the *politai*. Viewed from a politocratic perspective, however, who are the *politai*? Are they merely all members of the community, or are there additional qualifications for citizenship – for participation in cogovernment? In discussing this topic, one should keep in mind that citizenship is a multispherical conception. A person could potentially be a citizen of various communities – stretching from habitative to more comprehensive communities and even the global community. Although this is the case, the emphasis of the discussion of *politai* which follows below will again be on citizenship of one of the most fundamental building-blocks of a politocratic order – the habitative community.

4 Citizens – *politai*

The concept of *politai* differs fundamentally from that of individuals. From a politocratic point of view, not all adult individuals are *politai*. Although some distinction is already drawn between the two concepts in terms of the territorial-statist approach to citizenship, in terms of the politocratic approach, they differ fundamentally.

4.1 Citizens versus individuals; *res publicae* versus the private domain

When individuals are concerned, one would usually refer to people in their private capacity – people pursuing private and personal affairs, needs, interests, goals, preferences, affections, tastes, pleasures and happiness; people involved in affairs of a private and often intimate kind, namely those relating to household, family, work, erotic interests and amorous, platonic, commercial and similar relationships. All of these relationships belong to the private domain, where individuals may in various places be involved in the seclusion of their homes, but also beyond such intimate sphere. When people act in an economic capacity by engaging in commercial transactions, concluding a contract of service or a contract of sale or lease, which ultimately impacts on private estates, they are in fact not active

within the intimate private sphere. And yet, the kind of matters that they are engaging in are still of an individual nature. Although there are legal measures that are partially aimed at dealing with such relationships, preventing transgressions and exploitation, punishing transgressions, such relationships are inherently private in nature. The more private the relationship, the less it should be subjected to public regulation. All of us are individuals and all of us enter into private relationships and concern ourselves with such relationships, preeminently on the basis of our own, private preferences. Such relationships are affected by the personal composition, history and background of every individual concerned. Usually they are of such a unique and personal nature that people are normally quite unable to communicate and rationally explain their relevant personal aims, tastes, preferences, idiosyncrasies and needs to others. Other people often cannot understand and identify with matters which are of such personal and often intimate nature. We can barely do more than to accept that tastes differ. These relationships fall within the exclusive domain of the personal experience of the individuals concerned. Should an individual derive some benefit and experience some measure of joy from such individual matters, his experience will be personal and at most he would be able to share them with a small number of persons, with whom he has a close personal relationship. Should he suffer any harm, he will also do so in solitude. Other individuals cannot really have any sympathy and cannot really suffer in the same way, despite professing their heartfelt condolences and sympathy.

Whilst all persons are individuals, all of them are not citizens. Citizenship implies joint government and people will be citizens when they jointly control and govern the *res publicae* – the public affairs of general concern to everybody – in interaction with other citizens of the commonwealth. Any reference here to citizens and citizenship, must be politocratically understood in the sense of collectively governing the commonwealth by virtue of their office of citizenship.¹³

¹³ This view of citizenship is derived from Aristotle's view on citizenship and citizenly virtue. In Book III, chapter 13 131 Aristotle (n 11 above) explains that a citizen '... has a share both in ruling and in being ruled.' In Book III, chapter 1 103 Aristotle clearly states that a citizen is someone who is entitled to participate in the exercise of both consultative and judicial authority. See further Book III, chapter 5 112. Aristotle's conception of citizenship accords with his vision of civic virtue, which he describes as follows in Book III, chapter 4 109: 'But is it surely a good thing how to obey as well as how to command, and I think we might say that the goodness of the citizen is just this – to know well how to rule and be ruled.' See also 110 in the same chapter where Aristotle expands in the same manner. The clear distinction between the citizen and the individual means that the standards for a good citizen and a good individual also differ (Book III, chapter 4 107).

The distinction between citizen and individual coincides with the distinction between private affairs and *res publicae*. In a politocratic order the *res publicae* fall within the domain of political decision-making, whereas private affairs fall beyond politics – beyond the *res publicae* – where they are left to individuals to deal with in their private capacity. Although it might well be conceded that such distinction is not always crystal clear, it does not in the least mean that it is devoid of any importance. Distinctions drawn in social and political matters are after all never crystal clear. This distinction should therefore continuously find application in helping to ensure that the integrity of both the *res publicae* and the private domain, be retained.

When something from the private domain might erroneously be regarded as a *res publica* and become the subject of political decision-making, the political order would become dictatorial and totalitarian. Meddlesome individuals could then usurp the power to interfere in the private affairs and lifestyle of other people, dictating to them how they should run their lives. Legal dictates would then be abused as a coercive means of accomplishing individual conformity in the private domain, in respect of affairs that are of no concern to the commonwealth and other individuals. This would lead to the deprivation of individual autonomy and choices in respect of private matters and an unwarranted restriction of the private domain. It would further be tantamount to an inexcusable infringement on the individual dignity, freedom and privacy of those subjected to such dictates. The private sphere would then be absorbed into the *res publicae*, causing the public discourse in respect of the *res publicae* to be erroneously occupied by the private affairs of individual people. Politics that should be concerned with *res publicae* would thus be cast in a bad light and be detrimentally affected as a result of its offensive application to justify transgressions in the private domain. The protection of individuals against political encroachment and dictates and the concomitant protection of individual rights, form part of the gains of the modern era, which indeed afford a shield against transgressions targeting individuals in the private domain. Furthermore, it is important in maintaining political communities and thus of great value in terms of a politocratic approach.

The abuse of politics for impinging on individual freedom of choice and thus for encroaching on the private domain, is not only detrimental to individual dignity, freedom and privacy; it is also detrimental to the political community and citizenship. It abusively mobilises a distortive concept of the *res publicae* against individuals in their private domain. In doing so, the integrity of the commonwealth with its exclusive public nature would be infringed by conduct that is not germane thereto and the reputation of the *res publicae* would thus also be tarnished to the detriment of political

participation. This would have the effect of excluding citizens from the sphere of public participation on the basis of private considerations and preferences that are totally alien to the *res publicae* and the office of citizenship. The disparagement of individual freedom, which encroaches on the individual's private domain, would at the same time be detrimental to both the exercising of citizenship and political participation, because in the public domain the private choices of individuals would be held against them, hampering the exercise of their citizenship. This would inflict a double blow on the *res publicae* and politics. On the one hand, (individual) citizens are being discriminated against in their capacity as citizens in respect of matters that are unrelated to citizenship and the commonwealth. At the same time, it would detrimentally affect the political community as a whole – one of the most important *res* of the *res publicae* – because the political contribution that these citizens could have made to such community, would be lost.

In the field of political participation in the affairs of the commonwealth, people should interact as citizens. Within this sphere people should judge one another on the basis of their opinions, insights and judgments on public affairs, and not on the basis of their psychological composition, personalities and private lifestyles and choices. The crux of the matter is that standards of good citizenship vis-à-vis criteria for good individuals could be rather different. Someone could be an admirable citizen, without having to be an extremely exemplary individual. On the other hand, it is quite possible that a good individual could possibly fail to meet the requirements of citizenship. The criteria simply differ.¹⁴

Should this distinction between a good individual and a good citizen not be heeded and the criteria in respect of the private sphere be applied to the public sphere, or vice versa, both the citizen and the individual would be detrimentally affected and the integrity of both the private domain and the public sphere in which the political process must play itself out, would be infringed. This problem might arise in any political community – large or small – but it could become particularly acute in small habitative communities with a small membership, thereby threatening the destruction of such a community. In a political community of restricted ambit, a small group of puritans could gain control more easily, and could regulate the private lives of individuals in the name of the commonwealth, according to their puritanical convictions of how people should live their private lives. Thus, the political community would degenerate

¹⁴ Aristotle (n 11 above) Book III, chapter 4 107 makes a point of explaining this and concludes as follows: 'Clearly then it is possible to be a good and serious citizen without having that goodness which makes a good man good.' See also Book III, chapter 13 129.

into a stifling, puritanical, totalitarian order that would fatally undermine individual dignity as well as the political community at one stroke. It is for this reason *inter alia* that habitative communities, even though they should still form the basis of a politocratic order (see 2.2.2 above) should be open to correction by larger political communities. It is also for this reason that the optimal size of habitative communities, discussed later in 4.4, is of such vital importance.

4.2 Citizenship

From the distinction drawn above between the citizen and the individual, it has already been apparent that those present in a political community need not all be citizens. This aspect is one of the cornerstones of politocracy. A politocratic approach distinguishes between statist and politocratic citizenship. This coincides with the distinction drawn between massocratic democracy – democracy of the territorial state (see chapter 7.4) – and politocratic democracy. This point will now be illustrated in some detail.

Like statist citizenship, citizenship in a politocratic sense naturally also has a legal significance. After all, as was pointed out at the beginning of this chapter, politocracy denotes a politico-constitutional order, necessarily implying that political concepts also have to be accounted for in a legal sense. In discussing citizenship, however, one's point of departure would be political, rather than legal.

In the territorial state, citizenship is basically a specific status, for all practical purposes permanent and static. If you were once a citizen, you will remain a citizen of the territorial state of which you hold citizenship, until you have forsaken such territorial state and have complied with the requirements for acquiring the citizenship of another state. As explained before, citizenship (*politeia*) is essentially a political office and capacity – the capacity in terms of which a person jointly controls and reigns over the affairs of the community in collaboration with his fellow citizens. However, citizenship of this kind is of a temporary, erratic and dynamic nature. One becomes and will remain a citizen for as long as you are involved in the *res publicae* and participate in the government of the commonwealth. One will cease to be a citizen as soon as you terminate your involvement and participation in the joint government of the commonwealth and will become a citizen again as soon as you resume it. Admittance to citizenship will, however, always remain open to all members of the political community who are of full legal capacity. It will depend on the free will of each and every member of the political community. Should someone prefer to spend all his

energy in pursuing his own private affairs, it would be his own concern. He would thereby opt to abandon his citizenship and leave it to those desirous of citizenship to reign over the commonwealth without him. Thus, his citizenship would be potential, rather than real. He would, however, be able to resume his office of citizenship by simply getting involved in the affairs of the commonwealth and starting to actively participate in its joint government. Many people never display any kind of interest in public affairs and are quite happy and content to be active in the private domain. They would therefore never hold the office of *polites*. The commonwealth leaves them cold and they would never develop the necessary knowledge, insight and judgment associated with participation in government. Such state of affairs would be lamentable in view of the high premium politocracy places on citizenship. However, it would still be more lamentable to bestow any measure of authority over the commonwealth on such nonchalant and ignorant persons, for by such action the antithesis of a politocracy – an idiotocracy¹⁵ – would be promoted: Those who are not interested at all in, and not conversant with commonwealth affairs, instead of those who are indeed interested in the *res publicae*, would then become the joint rulers of the political community. Politocracy rejects any idiotocracy of the nonchalant and the ignorant (the non-*politai*) and rather strives to establish a government by real citizens – the *politai*.

The central concept of democracy in the territorial state is that of the enfranchised voter. Accordingly, political participation basically hinges on suffrage. In such a dispensation a person's interest in politics, knowledge, insight and judgment in respect of the *res publicae* are of no concern whatsoever. Just like citizenship, the franchise denotes a permanent status (and the attendant competence to vote). A person acquires the franchise on the basis of the formal criteria of being a citizen of a specific state and attaining a prescribed age. There is a tacit assumption that anyone reaching the prescribed age will thereby acquire the ability of possessing sufficient discernment to participate in public affairs. In earlier times – before general adult franchise became the fundamental element of (statist) democracy – a variety of other criteria like those pertaining to property, class, literacy or gender were applied in order to regulate admission to political participation and exercising the franchise (and also to exclude people therefrom). It could perhaps be argued that at least some of these criteria afford an indication of a person's ability to participate in public decision-making processes. Thus, it could be argued that proprietary rights in respect of immovable property, or the generation of an annual minimum income would be indicative of

¹⁵ Idiotocracy is derived from *idiotos*, the Greek designation of someone uninterested in the affairs of the polis.

a greater interest in the functioning of the political community and would promote more responsible political participation and decision-making.

These criteria, however, all suffer from the same fundamental weakness, namely that they ignore the distinction between the commonwealth and citizenship, on the one hand, and the private domain and the individual, on the other. All the criteria are basically criteria of a private nature and none is relevant to politics or the joint governing of the commonwealth. What, after all, would be the significance of issues like a person's gender, literacy, income or age regarding his ability to competently participate in the affairs of the commonwealth? Irrespective of such questions, a person may either be incredibly competent, or extremely incompetent for participation in and control of the *res publicae* — or be somewhere in between. However, these factors as such cast no light whatsoever on someone's aptitude for political participation and joint government.

The admittance to political participation (the real exercise of citizenship) should be determined by the application of politically relevant standards. Ownership, income, academic qualifications or the mere legal status of citizenship should not be applied as a criterion for determining whether someone could participate in the political process. All these standards fail to account for the distinction between the individual and the citizen. Private standards, irrelevant to the commonwealth, are elevated to the political domain. Conversely, the critically relevant factor is encapsulated in the question of whether a person should make an advance to assume the office of citizenship in order to participate in controlling the *res publicae*. That would occur when a person, in his capacity as a citizen of a political community, shows some interest in and genuinely devotes himself to matters concerning the *res publicae* and jointly participates in its government.

Against this background, the granting of general adult suffrage purely on the basis of having reached a specific minimum age, would seem to be inappropriate. Someone's aptitude for meaningfully participating in the affairs of the commonwealth should after all not be dependent on a factor, like age, that is primarily of a private nature. Of course, we have to determine a minimum age for political participation, simply because experience has taught that good judgment is something that only develops when adulthood has been reached. However, that does not mean that simply reaching the minimum age necessarily accomplishes (equal) political competence. On the contrary, as pointed out earlier, the decisive factor should be whether a person has in fact taken it upon him to assume the office of citizenship and to join in the governing process. In any particular case, this could happen when someone reaches the age of 20 years,

whilst a person of 60 years, who shows no interest whatsoever in such activities, might not be regarded as a citizen. Under a politocratic dispensation, the office of citizenship would differ from such office in terms of statist democracy, because the former is not primarily evident from the fleeting exercise of suffrage once every few years, but from other activities, such as participation in discussions and decision-making on matters concerning the *res publicae*. Particularly in view of the fact that the habitative community is of a much more restricted scope than the territorial state, the possibility of genuine public discussion, decision-making and administration is infinitely more likely than in the massocracy of the territorial state.

Taking account of the way in which citizenship is regarded in a politocratic sense, democracy, if politocratically viewed, differs fundamentally from statist massocracy in two important respects.

In the first place, the constituting elements of politocracy are not its enfranchised voters, but a numerically restricted corps of *politai*. In a politocratic dispensation, a politically relevant corps of citizens would conduct the political discourse and would govern the commonwealth. Government would therefore vest in an elite, who is indeed a politically relevant elite of citizens, owing their elite status to their politically relevant interest in and dedication to the *res publicae*. They would qualify as government on the basis of politically relevant criteria. They would, however, be an open – and pervious – elite and not a closed-shop aristocracy, because – as pointed out earlier – the office of citizenship would be of a dynamic nature and any member of the relevant political community might acquire or lose citizenship or, if he were to prefer living his life in the seclusion of the private domain, he would be free never to assume such office. The point is that government in the territorial state, irrespective of how democratic it may appear, will always find expression in some or other form of elitist government. This is evident from the discussion of the democratic legitimacy fiction in chapter 7. Although politocracy acknowledges the reality of an elite government, it would ensure that such elite would be politically relevant, suitably qualified and open; not a plutocratic elite of the wealthiest, or a party elite of those best organised or the like.

Secondly, in terms of politocracy, democracy would primarily be a continuous conducting of the political discourse within an open politocratic elite, which consists of a politically interested and enthusiastic corps of citizens, and the continuous guarding and governing of the commonwealth. In contrast, the crux of statist democratic politics is to be found in the fleeting exercise of suffrage by often apathetic and ignorant individuals, who are periodically mobilised to cast an uninformed and ill-considered vote driven by personal interest, party loyalties, an effective party organisation,

stereotypes, financially sponsored media manipulation and similar irrelevant considerations.

4.3 Civic equality

In the *res publica* citizens meet as equals, because they share the common and equal office of citizenship (*politeia*). They have an equal share in their concern with and government of the commonwealth, in respect of which process private statuses, qualities and activities, like gender, profession, trade, opulence, etc – which might otherwise have caused inequalities – play no part.¹⁶ Such matters are absolutely irrelevant. Someone's achievements or failures in the private domain afford no indication of his proficiency as a citizen. Someone who is a bad performer in the private domain might be an excellent citizen, display good judgment concerning the affairs of the commonwealth and therefore excel in the field of joint government of the commonwealth. Conversely, a brilliant scientist, academic, lawyer, parson, tradesman or similar specialist might be a bad citizen with a weak grasp of commonwealth affairs, due to the fact that he is preoccupied with his work. The crux of the matter is that commonwealth affairs demand a unique kind of proficiency, judgment and skill, removed from private attributes and activities. That is the ability to govern the commonwealth in a judicious way in interaction with other citizens. This ability would be cultivated particularly when citizens are continuously occupied with the affairs of the commonwealth. Specialisation in the professions, commerce, technology, etc hones the ability to act proficiently within the relevant field of specialisation. However, such focus on a specific field, acquired by sustained practice, usually implies that the specialist would be out of his depth in another field of specialisation that is alien to him, for after all, there would hardly be any time left to pay attention to something else. Similarly, the specialist would also be inclined to be out of his depth in the (political) field of the *res publicae*, as it likewise falls beyond his field of specialisation. Although specialisation is an economic necessity, it might tend to weaken the specialist's interests and proficiency in respect of the *res*

¹⁶ This was already understood and illustrated by Aristotle. See for example Aristotle (n 11 above) Book III, chapter 4 109-110. Much later, in 1790, Edmund Burke expressed himself in a similar way in his *Reflections on the Revolution in France* (1968) 133. He had the following to say about professional people: 'Their very excellence in their particular functions may be far from a qualification for others. It cannot escape observation, that when men are too much confined to professional and faculty habits, and, as it were, inveterate in the recurrent employment of that narrow circle, they are rather disabled than qualified for whatever depends on the knowledge of mankind, on experience in mixed affairs, on a comprehensive connected view of the various complicated external and internal interests which go to the formation of that multifarious thing called a state.' At 138-9 of his work, Burke further elaborated on this.

publicae. Of course, a specialist could possibly be capable of making a great contribution to politics, but this should not be due to his extrapolitical specialisation, but to his acquired proficiency and discernment in respect of the *res publicae*, over and above his specialised abilities.¹⁷

In conformity with their equal status as citizens regarding commonwealth affairs, the political discourse should also be conducted on a footing of equality. After all, those affairs, being public affairs, are of common interest to all, and no citizen should therefore be excluded or deterred from participating in the public discourse because of the inaccessibility of technical language. Discussion of issues concerning the *res publicae* would require an ability to deal effectively with public matters of general importance. These discussions would not be conducted in the technical language of a moral philosopher, economist, theologian, physicist, political scientist, engineer, lawyer, chemist, etc. For example, if a theologian were to discuss commonwealth affairs in theological terms, the discussion would cause inequality from the outset, as such discussion will only be accessible to those versed in theology, while excluding all others. This would destroy the inherent equality of citizenship and unduly advance theologians in the political discourse on commonwealth affairs, while all other citizens would be excluded. That would be unacceptable, for no matter how religiously expedient the theological discourse might be, it would be irrelevant in respect of dealings that are applicable to the *res publicae*. Furthermore, it would also be detrimental to the commonwealth, as it would cause inequality among citizens and would thus hamper the discourse on the commonwealth. When moral issues that might affect the commonwealth are at stake, the discourse in respect of such issues should likewise be conducted in political jargon in which everyone is equally proficient. Juridification of the *res publicae* would cause a similar flawed state of affairs where public affairs affecting everybody would be hijacked by a legal elite employing legal terminology, with the effect that citizens would be subjected to an apparently better informed elite. After the rise of the territorial state and particularly as a result of the importance of human rights, this issue is currently particularly topical (see chapter 8.3.4). There is obviously nothing untoward about being advised and enlightened by experts. In fact, advice and guidance on economic issues, in particular, is extremely important in this context, since economic issues are so closely associated with the general well-being of the commonwealth. However, such advice — as any other professional advice, for that matter — should be conveyed to all citizens in

¹⁷ It conforms to the distinction between the virtuous citizen and the good individual, to which we have already alluded, with reference to Aristotle.

comprehensible language, in order to enable all citizens to make properly informed decisions. It should not give rise to a situation where the citizens might abandon their duty to govern.

4.4 Scope

Politocracy parts with citizenship's exclusive identification with the territorial state, and identifies citizenship mainly with more restricted and close-knit habitative communities where a *res publica* would exist in real terms and where the citizens would experience it more directly and intimately. After all, citizenship depends on the existence of an abundant commonwealth, which could only exist in habitative communities. This approach to citizenship arises, amongst other things, from a rich tradition in which citizenship is made dependent on and associated with a small and close-knit community. This was already evident from the Greek association of the *citizen* and the *city state* (*polites* and *polis*), but it goes even further. What the Dutch *burger*, English *citizen* and *burgher*, German *Bürger* and French *citoyen* all have in common is that they are all identified with the geographically and demographically restricted, homogeneous and autonomous *burcht* (burg, castle), *borough*, *city* and *cit  *. The *burg* (i.e. castle and synonymous concepts) refers to a military fortress or citadel, i.e. a barricaded, walled and fortified place. Burghers (synonymous with *citizens* and *citoyen*, which are similarly derived from *city* and *cit  *), a derivative of *burg*, are the inhabitants of the citadel and, more specifically, those jointly governing it and taking responsibility for its defences, safety and general well-being, by mutually cooperating with their fellow burghers (citizens).¹⁸ This vision of citizenship is in conformity with the politocratic approach to it, and is also reflected in the Aristotelian view of citizenship in a democracy.

This very identification of citizenship with the smaller and closely-knit political community in particular, prompts the following question: what should the optimal scope of the habitative community be? How large should it be to be able to accommodate a political community comprising a significant and meaningful *res publicae*? Where would one find the critical equilibrium, between a too small

¹⁸ For the etymological association between *burg* and *burgher* (citizen), see for example: Dutch: JW Muller & A Kluyver *Woordenboek der Nederlandsche Taal* (1902) (Part Three) col 1895-1908; N van Wijk Franck's *Etymologisch Woordendoek der Nederlandsche Taal* (1912) 100; English: W Little *et al Shorter Oxford Dictionary: On historical principles* (prepared, revised and edited by CT Onions; third edition reorganised by GWS Friedrichsen Vol 1 (1978) 253; 351; German: W Pfeifer *et al Etymologisches W  rterbuch des Deutschen* (1989) 232-233; E Seehold *Etymologisch W  rterbuch der Deutschen Sprache* (1989) 114-115; French: A Dauzat *et al Nouveau Dictionnaire   tymologique et Historique* (1987) 169.

and a too large community, for accomplishing a habitative political community?¹⁹

Although there is no simple answer to this question, there are some indications that may help in finding an answer – indications already implicit in the politocratic approach that has been sketched thus far. In discussing such optimal size or scope, all three of the habitative communities mentioned earlier are kept in mind, although particular emphasis will be placed on the first of those – the local cultural community, where a homogeneous cultural community shares the same space.

It has already been argued that the territorial state is simply too comprehensive to maintain a political community, citizenship and democracy. Citizenship, implying real impact and joint government, is difficult to accomplish, and democracy degenerates into massocracy. These matters have already been discussed in some detail. On the other hand, a community might also be too small to accomplish a political community, because citizenship, a commonwealth and democracy could be frustrated, just as in the case of too large a system. After all, politocracy aims to establish vibrant *political* communities in which the exercise of citizenship is a paramount *res publica*. For that specific reason it needs to be much more comprehensive than any private community. It may therefore never be too small, because then the public character of politics would succumb too easily in favour of private qualities, relationships and issues.

In considering the question regarding the scope of the habitative community, the first important point to be noted is that a political community should at least be a community. There should be reciprocal contact and interaction among people. In particular, citizens should be able to communicate directly and continuously with one another in proper fashion, to enable them to effectively control the *res publicae*. This implies that they should not live too far apart, since that would preclude decision-making and government, or at least impede it considerably. Although swift electronic communication could indeed assist in facilitating such interaction, it would not replace the need to experience the presence of other citizens. The commonwealth, in respect of which decisions have to be taken, should rather be genuinely experienced instead of merely abstractly construed. Therefore, the most ideal kind of habitative community would be one that is physically restricted in scope – a city with a small hinterland, rather than an extensive territory. Should a

¹⁹ This has been an issue since the era of Classical Greek political philosophy and was discussed *inter alia* by Aristotle (n 11 above) Book VII, chapter 4, especially at 266.

community be physically too expansive, the *res publicae* of *patria*, community and public institutions would acquire too much of a notional content, rather than having a real existence and being experienced in a real sense.

Furthermore, a political community would naturally not simply be a gathering of *any number of men* in their private capacities. To qualify as a political community, a commonwealth – a *res publica* – of public matters that are of general importance to the community concerned should exist. Without such commonwealth, the community would not be a political one, but merely a private assemblage where interaction merely occurs among individuals, instead of interaction among citizens governing a commonwealth. The requirements are twofold.

The first requirement is politocratic-mindedness. This implies a discourse among citizens in respect of the commonwealth, namely succinct, public interaction regarding the commonwealth, without any personal, private or intimate involvement. Although there must be some opportunity for engaging in the latter, it should neither occur in a political context, nor as the subject of the political discourse and decision-making. These private matters should not become political themes, because if that should happen, the genuinely public character – the commonwealth character – of politics would be lost and privatised. Politics would then be absorbed into the private domains of household, family, friendship and/or personally hostile relationships and the like, which would ruin politics. What this means is the following: citizenship should be impersonal in nature, signifying that the (citizenly) relationships among citizens would be entered into beyond household, family, friendship and similar private and personal relationships of affinity or personal aversion. Naturally, citizens would also become acquainted in their personal capacity and personal feelings of affinity or aversion would undoubtedly arise. This, however, would remain a private matter, not incidental to citizenship at all. The *ad rem* relationships among citizens with regard to the handling of the *res publicae*, would basically be of an impersonal nature and in fact detached from the individual interaction within the private domain.

Politocratic-mindedness, respecting the distinction between the private and political domains, conforming to the lines dividing individuals and citizens and preventing private affairs and preferences from determining the scope of the commonwealth, could go a long way towards maintaining the specific political character of the habitative community. However, where the numbers of individuals and citizens in a community are low, politocratic-mindedness would be hampered in keeping the focus of the political discourse focussed on the commonwealth and in distinguishing

citizenship from private qualities and interaction. The less people and citizens there are and the smaller the community, the greater the risk of the community being private, instead of maintaining the character of a political community that concerns itself with the *res publicae*. It would also become more difficult to prevent citizenship from being absorbed into private relationships. The less people there are in a community, the greater the risk of the impersonal character of citizenship being ruined and politics sinking into the quick-sand of excessive parochialism, and of a small group governing the community in totalitarian fashion based on private preferences, instead of with the aim of guarding the (public) *res publicae*.

Politocracy does in fact make provision for correction (see 2.2.2 above) that might assist in rectifying such transgressions. However, transgressions should rather be prevented right from the outset, by ensuring that the community would be large enough to combat harmful parochialism from within the community itself. It is at this point that the issue of the optimal numerical scope of the habitative community arises.

The discussion of community as one of the *res* of the *res publicae* (3.2 above) serves as the starting point of the discussion concerning the optimal size of the habitative community. In that discussion it was pointed out how liberating communities are to individuals. They enable people to specialise and therefore apply their energy to matters they are interested in and in respect of which they can deliver their best performance, instead of canalising part of their energy to matters in respect of which they lack the required skill. Accordingly, it facilitates individual satisfaction with regard to the widest possible spectrum of needs, interests, aptitudes and tastes and likewise enables people to follow the widest possible spectrum of occupations. These matters are of cardinal importance when an indication of the appropriate scope of the habitative community must be given. We could explain this as follows: Communities give rise to differentiation and enable individuals to specialise. Therefore, communities are instrumental in creating an interdependent network of specialising individuals. Individuals derive great benefits from the wide variety of skills, talents, energy, trades, professional and commercial activities, etc, that are the products of such an interdependent network. However, individuals in their private capacity are not the only ones to benefit from such differentiation and specialisation. This variety and specialisation are also vital arteries of the political community. The variety protects the political community against excessive parochialism. It endows the community with citizens who, as a result of their collective rich backgrounds of diverse experiences, training, economic activities, etc, could supply the political community with a large variety of visions, insights and opinions, thereby assisting in establishing politicocratic-mindedness. With such a variety, the

chances are slim for a political community to lose its political character and degenerate into a condition of privatism where small-minded attitudes towards, for instance, ideological, moral or religious issues and fundamentalism would prevail. In this regard educational institutions play a pivotal role because of their ability to stimulate a free and open mindset through the necessary intellectual guidance in order to face the challenges of the world in an exemplary fashion. Moreover, educational institutions give expression to, promote and stimulate a broad spectrum of specialised human activities. Educational institutions could therefore also be of use in a practical way because they could assist in determining the optimal numerical scope of habitative communities. The numerical strength of the members of a habitative community should be high enough to justify the establishment of a university with a comprehensive curriculum, a technical university and facilities where appropriate functional training for the various occupations and the necessary intellectual guidance to face the challenges of the world in an exemplary fashion could be provided.²⁰ These institutions should obviously also bear a special responsibility to promote politocratic-mindedness, in order to be institutions serving the entire political community, instead of being dysfunctional servants of only certain sections, convictions, ideologies or denominations in the community. As a result it is suggested that a habitative political community (in particular a local cultural community) should be able to reach its optimal scope within a community of about one quarter of a million people. Although the number may be considerably higher, it should, however, never become so high as to degenerate into a state of impoverished citizenship, the massocracy of statist democracy and similar defects, characteristic of the territorial state. One might argue that when the number surpasses one million, alarm bells warning against all of this would start sounding.

One should continuously keep in mind that habitative communities, of whichever kind, would never be isolated or sovereign. Although habitative communities would constitute the irreplaceable elements of politocracy, the latter would not end there, it would begin there. Politocracy envisages a dispensation beyond the territorial state, in terms of which we would simultaneously form part of more comprehensive political communities and greater worlds, in which we would participate both as citizens and as individuals. Political power and decision-making would be diverse and separate. Nowhere would it be settled in a single location. Nowhere would it be centred. The foundations of politocracy would, however, be laid in healthy habitative communities in the form of political communities.

²⁰ A population of one quarter of a million would likely be large enough to support such institutions, thereby establishing a comprehensive complex of specialisation in order to ensure that the habitative community is mainly self-sufficient.

That is where we would live our lives in the first place and where we, in our capacity as citizens, would be enabled to govern the commonwealth in a real sense and in cooperation with our fellow citizens. Furthermore, although our public identity would not be fully monopolised by our habitative community and would also be jointly determined by the fact that we belong to more comprehensive political communities, our public identity would especially not be determined and disciplined in conformity with the needs of the Leviathan of the territorial state.

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A masterly summary of the history of Western political philosophy, political science and constitutional law introduces a profound and disquieting analysis of the modern territorial state. Isn't 'democracy' in a heterogeneous society with a numerically dominant group necessarily synonymous with the oppression of minorities? Can human rights and the courts sufficiently protect the uniquely distinctive character of minorities? Prof Malan presents his partial solution of 'habitative communities' – voluntary groupings of like-minded persons that can be formed on various bases – by no means in a prescriptive manner, but as a thought-provoking contribution that will give rise to serious reflection and debate in both academia and political practice.

– Eberhard Bertelsmann, *High Court, Pretoria*

Is the classical triad of "monarchy, aristocracy, democracy" soon to be supplemented with a fourth type, namely "politocracy"? Or should we rather replace the triad with its further evolved form, which affords a more plausible representation of the diversity of our society? Koos Malan has succeeded in arousing our thoughts on the path followed by the modern state, by referring to the most authoritative authors – past and present. But above all, it is his own analysis that urges the reader on, not only towards new designations, but especially towards improved realities.

– Frank Judo, *Advocate, Brussels*

The author demonstrates that the modern territorial state in fact fails to provide due protection to various linguistic, cultural and religious entities within the state. He proposes well-considered, practical and stimulating suggestions for the possible solution of problems that are especially experienced in states that contain strong minority cultural groups. His description of politocracy, which amounts to actual democracy, deserves real and thorough consideration.

– George Barrie, *University of Johannesburg*

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